Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

CLIFFORD L. VAN SYOC, ESQUIRE,

Petitioner,

v.

HOUSING AUTHORITY AND URBAN REDEVELOPMENT AGENCY OF THE CITY OF ATLANTIC CITY, A New Jersey municipal corporation; JOHN GLOWACKI; JOHN J. McAVADDY, JR.; and JOHN P. WHITTINGTON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Third Circuit, the Panel and the District Court made clear errors, and thereby abused their discretion, in sanctioning counsel for opposing summary judgment in an employment discrimination case by completely ignoring defense counsel's admission in writing that the case had a roughly 50/50 chance of going to the jury, and where the outcome of the motion hinged on a disputed issue of unsettled law and the District Court's own fact-sensitive and inference-laden conclusion that plaintiffs' circumstantial evidence of "pretext" could not create a triable issue of fact; and

2. Whether the Third Circuit, the Panel and District Court erred in affirming as *reasonable* a fee recovery of over 380 hours of legal work — over two months of full-time attorney work — expended after the full briefing of the summary judgment motion had been completed and while awaiting the District Court's decision in a case that defendants now claim was patently frivolous, especially where defense counsel conceded plaintiffs' prospects of going to the jury was roughly 50/50.

STATEMENT OF PARTIES [AND AFFILIATES]

In addition to the parties named in the caption of the case in this Court, the Petitioner Clifford L. Van Syoc ("Petitioner" or "Van Syoc") was made a party to the action in the United States Court of Appeals for the Third Circuit by virtue of the New Jersey District Court's August 27, 2001 decision which granted counsel fees and sanctions against the Petitioner.

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OPINIONS BELOW

The Petitioner seeks review of the: (1) United States District Court for the District of New Jersey's Decision dated August 27, 2001; (2) United States Court of Appeals for the Third Circuit Panel's Decision dated October 16, 2002, which affirmed the District Court's Decision; and (3) United States Court of Appeals for the Third Circuit's Decision dated November 12, 2002, which awarded additional counsel fees and costs against the petitioner in the amount of $18,698.46 pursuant to F.R.A.P. 38.

STATEMENT OF JURISDICTION

The Petitioner filed an application for *En Banc* review, which was denied by the United States Court of Appeals for the Third Circuit on December 13, 2002. On January 28, 2003 Justice David H. Souter entered an Order extending the Petitioner's time to file a Petition for a Writ of Certiorari until May 11, 2003. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Plaintiffs Todd Murphy ("plaintiff" or "Murphy") and his wife, Roseann Murphy, sued Murphy's employer, the Housing Authority and Urban Redevelopment of City of Atlantic City ("the Authority"), as well as certain of its representatives, John Glowacki, John J. McAvaddy, Jr., and John F. Whittington. The suit was precipitated by defendants' denial of plaintiff's request for an exception to the Authority's standard personnel policies pertaining to raises, which exception the Authority and individual defendants had routinely recommended or granted, both before *and after*

plaintiff's request, to African-Americans, but which the defendants denied to the plaintiff for no other stated reason than the claim that they had to "make a stand" against such exceptions.

Plaintiff instituted suit pursuant to 42 U.S.C. § 1983 and the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1, *et seq.* ("LAD"), alleging reverse discrimination. Plaintiff sought to recover damages for lost income, emotional distress, and punitive damages, and for disruption of the marital relationship between the plaintiffs. On a Motion for Summary Judgment, the District Court granted the Motion in its entirety by Opinion and Order dated January 27, 1999. On February 26, 1999 plaintiffs filed a Notice of Appeal. On January 31, 2000, a three-judge panel of the United States Court of Appeals for the Third Circuit affirmed the District Court's decision. **In reaching this conclusion, the Panel did not find that plaintiffs' appeal was "frivolous."**

After the District Court ruled on defendants' motion for summary judgment, the defendants moved to impose counsel fees upon plaintiffs and their counsel. Plaintiffs opposed the application. By letter dated February 1, 2000, the District Court invited all counsel to file supplemental briefs in connection with the defendants' application for fees in light of the Third Circuit's ruling. Both parties filed supplemental Briefs with the Court on February 14, 2000 and on February 13, 2001; the defendants improperly filed a Second Supplemental Application for Counsel Fees and Expenses relating to the defense of plaintiff's *appeal* to the Third Circuit. On February 16, 2001, the District Court held oral argument on defendants' applications for fees, reserved decision, and requested a supplemental brief from plaintiffs' counsel, Clifford L. Van Syoc, Esquire, on the issue

of whether defendants' counsel fees should be assessed against Mr. Van Syoc personally pursuant to 28 U.S.C. § 1927. Plaintiffs filed a supplemental brief, and on August 27, 2001 the District Court issued its Opinion and Order in which it granted defendants' applications for fees and costs in part, and assessed such fees and costs directly, but only against Mr. Van Syoc in the amount of $59,215.60. The District Court expressly denied the defendants' application for attorney's fees and costs in connection with the appeal. On October 16, 2002, the Panel issued its decision in which it summarily affirmed the District Court's award of attorney's fees and costs against Mr. Van Syoc. On November 12, 2002, the United States Court of Appeals for the Third Circuit entered an Order awarding additional counsel fees and costs against the petitioner in the amount of $18,698.46 pursuant to F.R.A.P. 38, which Order was issued before the time within which petitioner could oppose the application had expired. The petitioner filed a request for *en banc* review and/or reconsideration of the Panel's October 16, 2002 decision, which was denied without analysis on December 12, 2002.

REASONS FOR GRANTING THE WRIT

Petitioner hereby petitions the United States Supreme Court for a Writ of Certiorari from the United States Court of Appeals for the Third Circuit Panel Decision dated October 16, 2002 and the United States Court of Appeals for the Third Circuit Decision dated December 12, 2002 which affirmed the judgment of the District Court entered on August 27, 2001, in which the District Court granted the defendants' motion and awarded the Authority $56,000.00 in fees and $2,300.00 against the Petitioner, all of which had been paid by the defendants' insurance carrier. It is respectfully

submitted that these decisions conflict directly with the United States Court of Appeals for the Third Circuit's prior decision in *Hackman v. Valley Fair*, 932 F.2d 239 (3d Cir. 1991) as well as the decisions of other Districts discussed below.

For the reasons set forth herein, consideration by this Court is therefore necessary to secure and maintain uniformity of the decisions of the United States Court of Appeals for the Third and other Circuits; alternatively, the proceeding involves questions of exceptional importance as the Third Circuit's and Panel's Decisions have unquestionably had a "chilling effect" on plaintiffs' pursuit of civil rights claims as they stand for the proposition that a civil rights plaintiff's counsel may be **personally** held liable for defense costs for merely opposing a motion for summary judgment, a notion which is diametric to the remedial purpose of the civil rights laws, 42 U.S.C. § 1983 and the LAD.

The record should further reflect that the petitioner has, through his efforts in advocating claims on behalf of civil rights plaintiffs, had a substantial impact and actually changed the law in the State of New Jersey with regard to claims arising under the LAD. *See Taylor v. Metzger*, 152 N.J. 490 (1998). In *Taylor*, having lost at both the trial and appellate levels, the petitioner refused to abandon his client's claims. As a result of the New Jersey Supreme Court's decision in *Taylor*, the LAD was expanded such that a "hostile work environment" claim can be based on a single incident. *Id.* Shortly after the New Jersey Supreme Court published its opinion, this Court cited *Taylor* as controlling authority in *Faragher v. City of Boca Raton*, 118 S. Ct. 2275, 2290 (1998); thereby recognizing the dramatic impact that the petitioner has had in the field of civil rights law. Under the

rationale adopted by the Third Circuit and District Court in this matter, such a result could never occur, as the mere opposition of the motion for summary judgment now serves as the basis to sanction counsel who pursue claims beyond the trial level.

I. THIS COURT SHOULD GRANT CERTIORARI.

28 U.S.C. § 1254(1) provides that the Supreme Court may review cases in the federal courts of appeals by "writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree." The Supreme Court's jurisdiction in this regard is plenary in nature. *Forsyth v. Hammond*, 166 U.S. 506, 511-513 (1897).

Rule 10 states, in pertinent part:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> (a) a United States Court of Appeals has entered a decision in conflict with the decision of another United States Court of Appeals on the same important matter, . . . ; or has so far departed from the accepted and usual course of judicial proceedings,

> or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

As discussed herein, the actions of the Third Circuit, the Panel and the District Court fall squarely within the parameters set forth in 28 U.S.C. § 1254(1), Rule 10 and this Court's prior decisions such that the issues raised in this matter warrant this Court's review.

For example, in *Patton v. Yount*, 467 U.S. 1035 (1984), a case which involved a brutal murder, this Court granted certiorari noting that it was considering, in the context of the case, "the problem of persuasive media publicity that now arises so frequently in the trial of sensational criminal cases." In dissent, Justice Stevens wrote that "[t]he answer to the question why the [Supreme] Court grants certiorari in any given case usually involves considerations of both fact and law" but that the sensational facts alone [in *Patton*] "motivated the Court to select this case for plenary review." *Id.* at 1053.

It is well established that this Court will grant certiorari where a real or "intolerable" conflict on the same matter of law or fact exists. *See Insurance Corp. v. Compagnie Des Bauxites*, 456 U.S. 694, 700 (1982) (certiorari granted to review a decision of the Third Circuit which interpreted the federal discovery rules where the Third Circuit noted that its decision was in direct conflict with that of the Fifth Circuit); *see also United States v. Lorenzetti*, 467 U.S. 167 (1984) (certiorari granted to review a Third Circuit opinion that recognized that its interpretation of a statute was "squarely inconsistent" with that of the Sixth Circuit.)

One of the primary purposes of this Court's certiorari jurisdiction is to bring about uniformity of decisions on the same matters among the various Circuits and Districts. Thus, an irreconcilable conflict is sufficient to secure this Court's review. *See, e.g., McElroy v. United States*, 455 U.S. 642, 643 (1982) (certiorari granted because of "a conflict among the Circuits on an issue of statutory construction"); *Marks v. United States*, 430 U.S. 188, 189 (1977) (certiorari granted "to resolve a conflict in the Circuits"); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 373 (1981) (certiorari granted "to resolve a conflict among the Circuits on the appealability question" as to certain District Court decisions).

Justice Harlan noted that a conflict of decisions may safely be relied upon as a ground for certiorari in instances where it is clear that the conflict is one that can only be effectively resolved by the prompt action of the Supreme Court alone. *See* Justice Harlan, *Some Aspects of the Judicial Process in the Supreme Court of the United States*, 33 Austl. L.J. 108 (1959). Here, it is apparent that the errors of the Third Circuit and District Court can only be resolved through the prompt action of the Supreme Court.

Moreover, the issues for which the petitioner seeks review are both important and recurring in that the Third Circuit's and District Court's Decisions have a substantial impact on the prosecution of civil rights claims nationwide. It was for this very reason that this Court has previously granted certiorari. *See Aldinger v. Howard*, 427 U.S. 1, 3 (1976); *Fuller v. Oregon*, 417 U.S. 40, 42 (1974); *United Brotherhood v. United States*, 330 U.S. 395 (1947); *Minnesota Mining Co. v. New Jersey Wood Co.*, 381 U.S. 311, 314 (1965); *Commissioner v. Bilder*, 369 U.S. 499, 501 (1962).

Specifically, this Court has granted certiorari where a conflict exists and "a considerable number of suits are pending in the lower courts which will turn on a resolution of these issues." *Massachusetts Trustees v. United States*, 377 U.S. 235, 237 (1965). It is undisputed that our courts are flooded with civil rights claims arising under 42 U.S.C. § 1983, all of which, depending on their disposition, trigger the fee shifting analysis and imposition of sanctions which arises under 28 U.S.C. § 1927, the statute at issue herein.

The fact that the Third Circuit's Decision in this matter is contrary to its own prior decisions should serve as a basis for this Court's granting certiorari, as the Third Circuit's interpretation of 28 U.S.C. § 1927 relates directly to a recurring and important issue and conflicts with the decisions of other Circuits. *See Commissioner v. Estate of Bosch*, 387 U.S. 456, 457 (1967); *John Hancock Ins. Co. v. Bartels*, 308 U.S. 180, 181 (1939); *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 508 (1950); *Maggio v. Zeitz*, 333 U.S. 56, 59-60 (1948); and *Scarborough v. United States*, 431 U.S. 563, 567 n.4 (1977) (certiorari granted because of "split among the Circuits," one Circuit being noted as having an intracircuit conflict).

Finally, as described herein, there is no question but that the issues raised herein are intrinsically important, are "beyond the academic or the episodic," *Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1995), and are important to the public as distinguished from the importance to the parties herein. *See Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923); *Rice*, *supra* at 79.

II. THE THIRD CIRCUIT ERRED IN AFFIRMING THE DISTRICT COURT'S IMPOSITION OF ATTORNEY'S FEES AND SANCTIONS.

This case represents an extreme invocation of a Court's sanctioning power under 28 U.S.C. § 1927. Here, the Third Circuit, the Panel and the District Court somehow converted, without logical explanation, Petitioner's good faith opposition to summary judgment on claims resting on circumstantial evidence into sanctionable conduct. Although their decisions were not precedential, they chill the legitimate advocacy of civil rights and employment discrimination claims and frustrate the intention of Congress that our civil rights laws be vindicated primarily through private enforcement; they also rewarded a litigant who previously admitted the case had substantial merit (50/50 chance of going to the jury) but then misrepresented his own appraisal of the merits just to obtain an award of sanctions.

The Decisions below affirmed the imposition of nearly $60,000 in sanctions against Mr. Van Syoc for merely opposing a summary judgment motion in an employment discrimination case, the outcome of which hinged on a disputed issue of unsettled law, and on the court's inferential evaluation of the quality of the plaintiffs' evidence of pretext. It is undisputed that no Rule 11 motion was filed; no "safe harbor" letter was served; and no offer of judgment pursuant to F.R.C.P. 68 was made.

It is respectfully submitted that the lower Courts erred in: (1) affirming a finding of "bad faith" based on a patchwork of legal standards which, when disaggregated and analyzed, collapse; and (2) affirming the District Court's approval as reasonable over 380 hours of attorney time, allegedly expended

while summary judgment was pending, in preparing the trial defense of what defendants had argued were "frivolous" claims.

In issuing their decisions, the Third Circuit and Panel, without any analysis whatsoever, affirmed the District Court's "bad faith" findings. In so doing, the lower Courts made no express finding of the Petitioner's conduct, which rendered him sanctionable regardless of the strengths of the plaintiffs' case. Likewise, the Courts chose not to address the proof fatal to the defendants' claims, that being that even the defense thought the case had a substantial chance of surviving summary judgment. The Decisions below, if not set aside, mandate that an attorney abandon his or her clients at the most critical stage of litigation, for fear of engaging in sanctionable conduct by advocating their claims, if the least bit marginal, through summary judgment.

Defendants justified the expenditure of the trial preparation time to their insurance carrier by representing that rather than this case being utterly "frivolous," there was a roughly 50/50 chance of its going to trial, belying entirely their contention that a fee award was justified because plaintiffs had advanced wholly frivolous claims.

The Third Circuit's imposition of sanctions in this case under 28 U.S.C. § 1927 flies in the face of its own prior decisions cited by Petitioner, i.e., *In re Orthopedic Bone Screw Products*, 193 F.3d 795 (3d Cir. 1999); *Jones v. Pittsburgh National Bank*, 899 F.2d 1350, 1357 (3d Cir. 1990); *Mone v. C.I.R.*, 774 F.2d 570 (2d Cir. 1985); and *Williams v. Giant Eagle Markets*, 883 F.2d 1184, 1194 (3d Cir. 1989) quoting *Colucci v. New York Times Co.*, 533 F. Supp. 1011, 1014 (S.D.N.Y. 1982).

The critical flaw in the Decisions below is their utter failure to apply *Hackman v. Valley Fair*, 932 F.2d 239 (3d Cir. 1991), where, in similar circumstances, the Third Circuit refused to award sanctions, stating directly, ". . . submission of a weak argument to the court for resolution is [not] equivalent to bad faith." *Id. at* 243.

The rationale set forth in *Giant Eagle Markets* and *Hackman* has been widely applied in other Circuits as well. *See, e.g., McMahon v. Toto*, 256 F.3d 1120, 1129 (11th Cir. 2001); *Adams v. Autozoners*, No. 99-2336, 2000 WL 235-240 at 3 (E.D. La. February 29, 2000); *Hall v. Hormel Foods*, No. 8:98cv304, 2000 WL 1062103 at 9 (D. Neb. July 10, 2000); and *Glad-A-Way, Inc. v. Lynn Mayer's Great Lakes Glads., Inc.*, No. 5-93-239, 1994 WL 69467, at 3 (N.D. Cal. February 23, 1994). In the case at bar, the Third Circuit erred in failing to apply this rationale.

In failing to provide any analysis for the basis of the imposition of sanctions against Petitioner, under § 1927, the Third Circuit failed to comply with the standards set forth in *In re Prudential Insur. Sales Practices Litig.*, 63 F. Supp. 2d 516, 520 (D.N.J. 1999) (citing *Giant Eagle Markets*, 883 F.2d at 1191), *aff'd in part, rev'd in part*, 278 F.3d 175 (3d Cir. 2002); and *Baker Industries, Inc. v. Ceberus*, 764 F.2d 204, 209 (3d Cir. 1985).

Likewise, the Panel's October 16, 2002 Decision, affirmed by the Third Circuit on December 12, 2002, ignores the body of Third Circuit law which recognizes that merely defending weak claims at or beyond summary judgment does not constitute "bad faith." *See, e.g.*; *Hackman, supra* at 243 (3d Cir. 1991); *Giant Eagle Markets*, 883 F.2d at 1192; *Maxnet Holdings Inc. v. Maxnet*, No. A.98-3921, 2000 WL

714664 at 12 (E.D. Pa. May 31, 2000); *Farris v. County of Camden*, 61 F. Supp. 2d 307, 335 (D.N.J. 1999); and *Weeks v. Pfenninger*, No. 84-2977, 1987 WL 7194 at 2 (E.D. Pa. Feb. 20, 1987).

The Panels' decision also runs afoul of this Court's instruction:

> [I]t is important that a district court resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims.

Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421-22 (1978.)

The Panel's Decision also fails to address additional authority cited by Petitioner, specifically *Ford v. Temple Hospital*, 790 F.2d 342, 347 (3d Cir. 1986); *Loftus v. Southeastern Penna. Trans. Auth.*, 8 F. Supp. 2d 458, 461 (E.D. Pa. 1998), *aff'd*, 187 F.3d 626 (3d Cir. 1999), *cert. denied*, 528 U.S. 1047 (1999); and *Hicks v. Arthur*, 891 F. Supp. 213, 215 (E.D. Pa. 1995); but merely issued a blanket "affirmance" of the District Court's flawed analysis; as did the Third Circuit in its December 12, 2002 Decision.

Without discussion, both the Panel and the Third Circuit affirmed the District Court's finding that in opposing the summary judgment motion Petitioner pursued "baseless" claims. It is respectfully submitted that where, as here, counsel must wrestle with "pretext analysis", no such finding of "bad

faith" can lie. Pretext analysis demands close evaluation of evidence and the ultimate determination of whether the evidence adduced is of a kind that a trier of fact could "reasonably believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the [action.]" *Murphy v. Housing Authority*, 32 F. Supp. 753, 769 (D.N.J. 1999), quoting *Sheridan v. E.I. Dupont de Nemours & Co.*, 100 F.3d 1061, 1067 (3d Cir. 1996). Indeed, when the plaintiff's case on pretext rests on circumstantial evidence, as it often does,[1] a Court inevitably will assess whether there are "weaknesses, impossibilities, incoherence or contradictions" that permit a genuine argument of pretext. *Brewer v. Quaker State Oil Refining Corp*, 72 F.3d 326, 331 (3d Cir. 1995); *see also* Julie Tang & Hon. Theodore M. McMillian, *Eighth Circuit Employment Discrimination Law: Hicks & Its Impact on Summary Judgment*, 41 *St.L.U.L.J.* 519, 538 (1997).

While it is nearly impossible for a lawyer, *ex ante*, to predict whether evidence of pretext is compelling enough to survive this kind of scrutiny, the Decisions below subject an attorney who unsuccessfully makes that prediction to the imposition of massive costs and sanctions. Moreover, it is respectfully submitted that the Decisions below ignore *Williams v. Giant Eagle Markets*.[2] There, the Third Circuit rejected an application for sanctions finding that the attorney had reasonable grounds to believe that the purported non-discriminatory justification proffered by the employer

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1. *See Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1081-1082 (3d Cir. 1996) ("cases charging discrimination are uniquely difficult to prove and often rely on circumstantial evidence").

2. *Giant Eagle Markets* involved an appeal from a bench trial, not an appeal from a grant of summary judgment. 883 F.2d at 1187.

was susceptible to challenge. *Giant Eagle Markets*, 883 F.2d at 1192-93.

In addition, the lower Courts failed to address another applicable standard — whether plaintiff had made a "colorable claim" of employment discrimination. *See Campana v. Muir*, 615 F. Supp. 871, 877 (E.D. Pa. 1985); *Hackman v. Valley Fair*, 932 F.2d at 243.

The Panel's decision also fails to address Petitioner's objection to and analysis of the District Court's reliance on Petitioner's settlement negotiations as a basis for the imposition of attorney's fees and sanctions; nor does it provide any guidance to counsel who litigate civil rights claims, which provide for fee-shifting to a prevailing party. In so doing, it is respectfully submitted that the Panel failed to apply the standards set forth in *Evans v. Jeff D.*, 475 U.S. 717, 732, 735 (1986); *Marek v. Chesney*, 473 U.S. 1, 10 (1985); and *Rendine v. Pantzer*, 661 A.2d 1202 (N.J. 1995) (a claim arising under the LAD). The Panel's October 16, 2002, Decision is also contrary to the Third Circuit's repeated warnings to the District Courts to be cautious in their resort to sanctions because of the fear that too liberal use of sanctions will "chill[] an attorney's legitimate obligation to represent his client zealously." *In re Orthopedic Bone Screw Products*, 193 F.3d at 796, citing *Baker*, 764 F.2d at 208. That admonition is true for any kind of case, but it is particularly apropos in cases involving civil rights and discrimination, where for a variety of factors, sanctions law in the federal courts has had a pernicious effect.[3]

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3. *See, e.g.*, Margaret L. Sanner & Carl Tobias, *Recent Work of the Civil Rules Committee*, 52 *Mont. L. Rev.* 307, 313 (1991)

(Cont'd)

The Decisions below also fundamentally undermine the purpose of summary judgment, which is itself a brake on vexatious or meritless litigation. *Washington Post v. Keough*, 365 F.2d 965, 968 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967). The procedures under Rule 56 represent a finely-tuned balance between a desire for expeditious justice and a commitment not to deny litigants their day in court. *See Wright & Miller Fed. Prac. & Procedure 3d*, § 1272 (1999 Ed.) ("[i]t should be remembered that Rule 56 is not merely a dilatory or technical procedure; it affects the substantive rights of the litigants"). Thus, no Court should use the sanctions power of § 1927 to coerce parties to abandon their claims in fear of sanctions should they fail to prevail. The imposition of sanctions in this case does exactly that.

III. THE SIZE OF THE THIRD CIRCUIT'S AWARD OF FEES DEFIES COMMON SENSE AND THE PANEL ABUSED ITS DISCRETION IN REFUSING DISCOVERY ON THE REASONABLENESS OF THOSE FEES.

The lower Courts failed to adhere to the standards of *Browning v. Kramer*, 931 F.2d 340, 344 (5th Cir. 1991), which permits the imposition of only **reasonable** expenses under § 1927 and which permits the recovery of only those fees and costs caused by the sanctioned conduct. *Id.* at 344-45.

(Cont'd)

(noting that civil rights plaintiffs were 2.6 times more likely to be sanctioned than other litigants) (citing *Federal Judicial Center, Rule 11: Final Report to the Advisory Committee on Civil Rules of the Judicial Conference of the United States* (Feb. 27, 1991)).

It is readily apparent that the Panel erred in awarding fees for 380 hours of work that were incurred for continuing settlement negotiations and preparing for trial including legal research, preparing trial exhibits, preparing jury instructions, drafting motions *in limine*, meeting with witnesses and drafting a trial brief. 158 F. Supp. 2d at 452.

It is respectfully submitted that the *only* legal task to which defendants were subjected by counsel's conduct, *i.e.*, opposing summary judgment, was the burden of filing a reply brief to plaintiffs' opposition to summary judgment. Even that is questionable. *See Hicks v. Arthur*, 891 F. Supp. at 216 ("We deny . . . requests for fees incurred in replying to . . . [m]otion for [s]ummary judgment, because replies are routinely written and are generally needed in response to only the most persuasive oppositions); *Young v. West Coast Industrial*, 144 F.R.D. 206, 218 (D. Del. 1992) (noting that where no action was taken in response to sanctionable conduct, no fees should issue).

The Panel's decision is logically flawed where the record reflects that *after summary judgment was sought* and while the parties were awaiting what defendants must have known would undoubtedly be the complete dismissal of the action, they expended over two full months of attorney time preparing for trial. It is further undisputed that defendants did not perceive the matter to be so frivolous as to warrant a Rule 11 "safe-harbor" letter, consistent with Mr. Ercole's statement to the Authority that:

> **There's a better than 50/50 chance the entire thing will be thrown out. But there's enough stuff on the table both in his Complaint as far as legal allegations and factually that he may**

have muddied the water just enough that some of it from the Complaint will remain and we'll have to go to trial.

During the pendency of the appeal process, and while protesting that this matter was frivolous, defendants' counsel were simultaneously telling their insurance carrier in writing that there was a *25% to 35% chance that the case would go to trial* after the Third Circuit reversed and remanded for the District Court's reconsideration!!

The Panel's decision fails to address the defendants' duty to minimize their damages during the six months it took the District Court to grant summary judgment. *Riddle v. Egensberger*, 266 F.3d 542, 554 (6th Cir. 2001); *Pollution Control Indus. of America v. Van Gundy*, 21 F.3d 152, 156 (7th Cir. 1994); *Topalian v. Ehrman*, 3 F.3d 931, 937 (5th Cir. 1993); *In Re Yagman*, 796 F.2d 1165, 1185 (9th Cir. 1986), *citing*, Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181, 203 (1985). Rather, defense counsel billed defendant's insurance carrier for 380 hours worth of "trial preparation" in a matter they now claim was patently frivolous.

Finally, the Panel and the Third Circuit clearly abused their discretion in failing to allow plaintiffs' counsel any discovery on the issue of reasonable fees. The District Court dismissed the request by characterizing it solely as a *de minimis* concern over the identities of some of the lawyers appearing on the defendant Housing Authority's fee certification. 158 F. Supp. 2d at 453 n.4.

However, counsel had expressed his desire for discovery on two separate occasions — in his brief in opposition to defendants' application for fees pursuant to 42 U.S.C. § 1988 and at oral argument on the issue of sanctions pursuant to § 1927. Recently, the New Jersey Supreme Court has held that such discovery is permissible in these circumstances. *See Riding v. Towne Mills Craft Centre, Inc.*, 166 N.J. 222, 234 (2001), *corrected*, 167 N.J. 618 (2001). Given the obvious confusion as to the proper legal basis under which sanctions in this case were being sought, as well as the massive sanction imposed, it is a clear abuse of discretion for the Panel to reject counsel's requests for discovery and a violation of Petitioner's rights to due process and fundamental fairness; such that the taking of roughly $60,000.00 of his money would be an outrageous denial of procedural and substantive due process.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court grant the within Petition for Writ of Certiorari, together with such other further and different relief as this Court deems just and proper.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED OCTOBER 16, 2002

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 01-3426 and 01-3572

TODD MURPHY; ROSEANN MURPHY, husband and wife

v.

HOUSING AUTHORITY AND URBAN REDEVELOPMENT AGENCY OF THE CITY OF ATLANTIC CITY, a New Jersey municipal corporation; JOHN GLOWACKI, an individual; JOHN J. MCAVADDY, JR., an individual; JOHN P. WHITTINGTON, an individual; JOHN DOES 1 THROUGH 15, inclusive, fictitious named defendants, jointly, severally, and in the alternative

Clifford L. Van Syoc, Appellant at No. 01-3426 (Pursuant to F.R.A.P. 12(a))

Housing Authority and Urban Redevelopment Agency of the City of Atlantic City; John Glowacki; John J. McAvaddy, Jr.; John P. Whittington Appellants at No. 01-3572.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Appendix A

(D.C. Civil No. 97-cv-01558)
District Judge: The Honorable Stephen M. Orlofsky

Submitted Under Third Circuit LAR 34.1(a)
June 7, 2002

BEFORE: NYGAARD, BARRY, and MAGILL,*
Circuit Judges.

(Filed: October 16, 2002)

OPINION OF THE COURT

NYGAARD, *Circuit Judge.*

Todd and Roseann Murphy, represented by Clifford Van Syoc, sued the Housing Authority of Atlantic City, New Jersey, for, among other allegations, reverse race and sex discrimination in violation of 42 U.S.C. § 1983 and Title VII. The District Court found that Murphy failed to establish a prima facie case for any discrimination and granted summary judgment in favor of the Housing Authority. *Murphy v. Housing Authority*, 32 F. Supp. 2d 753 (D.N.J. 1999). Murphy appealed and we affirmed that decision on January 31, 2000. *Murphy v. Housing Authority*, 208 F.3d 206 (3d Cir. 2000). Subsequently, the Housing Authority, pursuant to 28 U.S.C. § 1927, filed an application for fees, costs and sanctions in the District Court, alleging frivolous litigation and frivolous appeal. The District Court granted

* Honorable Frank Magill, Circuit Judge for the United States Court of Appeals for the Eighth Circuit, sitting by designation.

the Housing Authority's motion in part, awarding the Authority $56,000 in fees and $2,300 in costs to be paid by Attorney Van Syoc for unreasonably and vexatiously multiplying litigation for the period up to the grant of summary judgment. The Court, however, declined to award damages for filing a frivolous appeal, holding that any such award was more appropriately handled by this court pursuant to a Rule 38 motion. *Murphy v. Housing Authority*, 158 F. Supp. 2d 438 (D.N.J. 2001). Both parties have appealed. Van Syoc argues that imposing sanctions against him was an abuse of discretion in that there was no clear finding of bad faith on his part. The Housing Authority argues that the District Court's refusal to award damages for filing a frivolous appeal was in error. We will affirm.

I.

Van Syoc argues that the District Court abused its discretion by imposing sanctions, and by making numerous clear errors in its finding of bad faith. His arguments are specious. 28 U.S.C. § 1927 gives a District Court the authority and discretion to levy expenses, costs and fees against any attorney "who so multiplies the proceedings in any case unreasonably and vexatiously." We have previously held that "a bad faith finding is required as a precondition to the imposition of attorneys' fees under section 1927." *Baker Industries, Inc. v. Valley Fair*, 932 F.2d 204, 208 (3d Cir. 1985). Although bad faith may be inferred from the record, here, the District Court found that Van Syoc acted in bad faith for the following reasons:

> (1) Mr. Van Syoc's pursuit of baseless claims, the frivolous nature of which he should have been aware by, at the latest, the Defendants' filing of their motion for summary judgment on August 17, 1998; and (2) Mr. Van Syoc's assertion of Roseann Murphy's *per quod* claim under the New Jersey Law Against Discrimination, N.J.S.A. § 10.5-1 *et seq.*, and Title VII, 42 U.S.C. § 2000e *et seq.*, when both federal and New Jersey state courts had already held that *per quod* claims were not cognizable under either of those sources of law.

Murphy, 158 F. Supp. 2d at 446-47. This finding was not clearly erroneous and we will affirm.

II.

The Housing Authority argues that the District Court erred as a matter of law when it denied the Authority's motion for damages from Attorney Van Syoc's frivolous appeal to this Court. We disagree. Quoting the D.C. Circuit, the District Court wrote that, "it is for the Court of Appeals, not the district court, to decide whether Rule 38 costs and damages should be allowed in any given case." *Murphy*, 158 F.2d at 451 n. 3 (quoting *In re American President Lines*, 779 F.2d 714, 717 (D.C. Cir. 1995)). Although we have, on occasion, remanded a Rule 38 motion to the District Court for it to assist us by holding a hearing to make findings on Rule 38 motions, here we have not done so and the court correctly deferred to us. We will affirm.

Appendix A

Conclusion

In sum, and for the foregoing reasons, we will affirm the judgment of the District Court entered on August 27, 2001.

/s/ Richard L. Nygaard
Circuit Judge

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED AUGUST 27, 2001

United States District Court,
D. New Jersey.

No. CIV.A.97-1558.

Todd MURPHY, and Roseann Murphy,

Plaintiffs,

v.

HOUSING AUTHORITY AND URBAN REDEVELOPMENT AGENCY OF THE CITY OF ATLANTIC CITY,

a New Jersey municipal corporation; John Glowacki; John J. McAvaddy, Jr., John P. Whittington, and John Does 1 Through 15,

Defendants.

Aug. 27, 2001.

OPINION

ORLOFSKY, District Judge.

I. INTRODUCTION

Once again, this Court is confronted with the spectacle of an attorney who has callously disregarded his professional obligations to this Court, his adversary, and his clients. In this case, Plaintiffs' counsel, Clifford L. Van Syoc, Esquire, has in bad faith turned a blind eye to the facts and law and

has unreasonably and vexatiously multiplied the proceedings in this case. The record reveals that Mr. Van Syoc continued to pursue this lawsuit even when it became clear that there was no basis in law or fact upon which his clients could prevail. While the Rules of Professional Conduct impose a duty upon attorneys to represent their clients' interests zealously, Mr. Van Syoc's zeal in this case had more to do with the recovery of his counsel fees than the merits of his clients' claims. While Rambo may be a success at the box office, lawyers who appear in this Court and adopt Rambo as a role model do so at their peril. For the reasons set forth below, pursuant to 28 U.S.C. § 1927, I shall assess counsel fees of $56,885 and costs of $2330.60 against Mr. Van Syoc personally. Mr. Van Syoc shall make payment to the Defendants within thirty days of the date of this Opinion.

II. BACKGROUND AND PROCEDURAL HISTORY

Plaintiff, Todd Murphy ("Murphy"), filed a Complaint in this Court on March 27, 1997, alleging that he was the victim of "reverse discrimination" on the basis of his race and sex, by his employer, the Housing Authority and Urban Redevelopment Agency of the City of Atlantic City ("the Authority") and several of its employees (collectively, "Defendants"). Subsequently, on December 31, 1997, Murphy amended his complaint to allege the following: (1) Count I, unlawful reverse employment discrimination based on race and sex; (2) Count II, unlawful reverse employment discrimination in violation of the New Jersey Law Against Discrimination, N.J. Stat. Ann. § 10:5-1 *et seq.*; (3) Count III, a *per quod* cause of action by Roseann Murphy, his spouse, for loss of companionship, society, comfort, care,

service and consortium; and (4) Count IV, unlawful reverse employment discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"). *See* Amended Complaint (filed Dec. 31, 1997).

On August 17, 1998, Defendants moved for summary judgment, contending that Plaintiffs had failed to establish a prima facie case of reverse employment discrimination, and that *per quod* damages are not recoverable in employment discrimination cases. Plaintiffs opposed the motion, contending that genuine issues of material fact precluded the granting of summary judgment.

On January 27, 1999, this Court filed an Opinion and Order granting Defendants' motion for summary judgment on all counts of the Amended Complaint, holding as follows:

> I shall grant the Defendants' motion for summary judgment on Counts I, II and IV of the Amended Complaint because Murphy cannot establish a prima facie case of unlawful reverse employment discrimination in violation of Title VII or the New Jersey Law Against Discrimination ("NJLAD"), and, alternatively, *because Murphy has failed to produce even a scintilla of evidence tending to show that the Defendants' proffered nondiscriminatory reasons for the adverse employment decisions were merely a pretext for invidious discrimination.* In addition, I shall grant the Defendants' motion for summary judgment on Count III of the Amended Complaint, because *per quod* claims are not cognizable in cases involving

> claims of employment discrimination in violation of Title VII and the NJLAD, and because as a derivative claim, a *per quod* claim cannot survive if the underlying claim fails.

Murphy v. Housing Authority and Urban Redevelopment Agency of the City of Atlantic City, 32 F.Supp.2d 753, 755 (D.N.J.1999) (Orlofsky, J.) (emphasis added).

On February 10, 1999, Defendants filed an application for counsel fees and associated expenses. *See* Defs.' Application for Counsel Fees, Case No. 97- 1558 (Docket Entry No. 31). On February 26, 1999, Plaintiffs filed a Notice of Appeal of this Court's decision of January 27, 1999. *See* Notice of Appeal, Case No. 97-1558 (Docket Entry No. 32). On January 31, 2000, in an unpublished opinion, a three-judge panel of the United States Court of Appeals for the Third Circuit affirmed this Court's decision granting summary judgment to Defendants on all counts of Plaintiff's complaint. *See Murphy v. Housing Authority and Urban Redevelopment Agency of the City of Atlantic City*, 208 F.3d 206 (3d Cir.2000).

By letter dated February 1, 2000, this Court invited counsel for both parties to file supplemental briefs on Defendants' pending Application for Counsel Fees and Associated Expenses in light of the Third Circuit's Opinion. Both parties responded by filing Supplemental Memoranda with the Court on February 14, 2000. On February 13, 2001, Defendants filed a Second Supplemental Application for Attorneys' Fees and Related Expenses, requesting attorneys' fees and associated expenses "relating to the defense of

Plaintiffs' frivolous appeal" to the Third Circuit. *See* Defs.' Second Suppl. App. at 1- 2.

On February 16, 2001, this Court heard oral argument on Defendants' Applications for Attorneys' Fees. The Court reserved decision on Defendants' Applications and requested a supplemental brief from counsel for the Plaintiffs, Clifford L. Van Syoc, Esq., on the question of whether Defendants' attorneys' fees should be assessed against Mr. Van Syoc personally pursuant to 28 U.S.C. § 1927. This Opinion addresses not only the issues raised by Defendants' original Application for Attorneys' Fees and Related Expenses, filed February 10, 1999, but also the arguments raised in Defendants' Supplemental Application, filed February 14, 2000, and Defendants' Second Supplemental Application, filed February 13, 2001.

III. DEFENDANTS' APPLICATION AND SUPPLEMENTAL APPLICATIONS FOR COUNSEL FEES AND RELATED EXPENSES

Pursuant to the so-called "American Rule" for payment of attorneys' fees, the "prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser." *Brytus v. Spang & Co.*, 203 F.3d 238, 241 (3d Cir.2000) (citing *Alyeska Pipeline Service Co. v. Wilderness Soc.*, 421 U.S. 240, 247, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975)). There are several statutory exceptions to this rule, two of which are relevant to the Applications now before this Court. They are: (1) 42 U.S.C. § 1988, which allows the prevailing party in civil rights litigation to recover counsel fees; and (2) 28 U.S.C. § 1927, which provides that any attorney who

vexatiously and unreasonably multiplies the proceedings in any case may be required by the court to satisfy the excess costs incurred because of such conduct personally.

A. 42 U.S.C. § 1988

This statute authorizes the court to award attorneys' fees to a prevailing party in a civil rights action brought pursuant to federal civil rights statutes.[1] The purpose of this provision is "to ensure effective access to the judicial process for persons with civil rights claims, and to encourage litigation

1. Section 1988 provides, in relevant part, as follows:

> (b) Attorney's fees
>
> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. §§ 1681 *et seq.*], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. §§ 2000bb *et seq.*], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C.A. §§ 2000cc *et seq.*], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. §§ 2000d *et seq.*], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

42 U.S.C. § 1988(b).

to enforce the provisions of the civil rights acts and constitutional civil rights provisions." *Hernandez v. Kalinowski*, 146 F.3d 196, 199 (3d Cir.1998). This provision, however, applies to a prevailing defendant as well as a prevailing plaintiff. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978) (holding that prevailing defendant in Title VII action may be entitled to attorneys' fees if "plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith"); *Hughes v. Rowe*, 449 U.S. 5, 101 S.Ct. 173, 66 L.Ed.2d 163 (1980) (applying same standard in application by prevailing defendant in § 1983 claim for attorneys' fees).

The Third Circuit has held, however, as have most other Circuits which have considered the question, that " § 1988 does not authorize the award of attorneys' fees against plaintiff's attorney." *Brown v. Borough of Chambersburg*, 903 F.2d 274, 277 (3d Cir.1990); *see also Smith v. Detroit Fed'n of Teachers, Local 231*, 829 F.2d 1370, 1374 n. 1 (6th Cir.1987); *Hamer v. County of Lake*, 819 F.2d 1362 (7th Cir.1987) (remanded to allow district court to consider other theories of liability); *Oliveri v. Thompson*, 803 F.2d 1265, 1272 (2d Cir.1986) (dictum), *cert. denied sub nom., Suffolk County v. Graseck*, 480 U.S. 918, 107 S.Ct. 1373, 94 L.Ed.2d 689 (1987); *Durrett v. Jenkins Brickyard, Inc.*, 678 F.2d 911, 915 (11th Cir.1982) (while reversing district court's failure to assess fees against counsel under court's inherent power, court observed that district court correctly determined that 42 U.S.C. §§ 2000e-5(k) of Title VII of the Civil Rights Act of 1964 did not authorize fees against counsel).

Appendix B

Based on my review of the record before me, it is clear that the driving force in this litigation was not the Plaintiffs, but Plaintiffs' counsel, Clifford L. Van Syoc. I reach this conclusion based on Mr. Van Syoc's conduct during discovery and settlement negotiations. For example, at the initial scheduling conference in this case, held before Magistrate Judge Kugler on July 30, 1997, counsel for Plaintiffs demanded $650,000 to settle the case, based largely on plaintiffs' alleged right to recover punitive damages and attorneys' fees. *See* Defs.' App. at Exh. B (Affidavit of Charles A. Ercole, Esq.), ¶ 8. In a letter dated March 12, 1998, Mr. Van Syoc wrote to counsel for Defendants, Charles A. Ercole, Esq.:

> I recently had the pleasure of discussing with Mr. Ercole his request for a revised settlement demand, which I assume means one less than the $650,000 previously expressed. Given the fact that in the last two employment cases this office was involved in which were tried to a conclusion, our counsel fees alone were approximately $450,000 and $550,000, respectively, we believe that our initial demand is more than reasonable.

Defs.' App. at Exh. D (Letter, Clifford L. Van Syoc to Charles A. Ercole, Esq., dated March 12, 1998). By letter dated April 28, 1998, Mr. Ercole informed Mr. Van Syoc that Defendants rejected the settlement demand based on their belief that Mr. Murphy's claim was without merit. Defs.' App. at Exh. F (Letter, Charles A. Ercole, Esq. to Clifford L. Van Syoc, Esq., dated April 23, 1998). Mr. Ercole advised Mr. Van Syoc that defendants would forgo their right to recover attorneys'

fees under § 1988 if Mr. Murphy would voluntarily dismiss his claim within 10 days, but noted that otherwise, "if you and Mr. Murphy continue to pursue this baseless action . . . defendants will seek every redress available under the law." *Id.*

Evidently unimpressed by Defendants' offer, Mr. Van Syoc, by letter dated May 5, 1998, responded to Mr. Ercole as follows:

> All posturing aside, it is crystal clear that plaintiff's claim has substantial merit, and your baseless threats are of no moment whatsoever . . . How you leapt to the conclusion that our demand is indicative of a lack of merit in Mr. Murphy's claim escapes us, and we are quite confident it will escape the court. In sum, if your clients wish to settle this case and avoid what will be a torrent of litigation by other disgruntled employees, feel free to respond, appropriately, to our demand by making a counteroffer.

Defs.' App. at Exh. I (Letter, Clifford L. Van Syoc, Esq. to Charles A. Ercole, Esq., dated May 5, 1998).

Continuing in this vein, by letter dated July 6, 1998, Mr. Van Syoc advised Mr. Ercole that "it is our belief that this case can be resolved for a reasonable figure, although it *cannot* be resolved in the five figures, since Mr. Murphy's counsel fees already exceed that number[.]" Defs.' App. at Exh. C (Letter, Clifford L. Van Syoc to Charles A. Ercole, Esq., dated July 6, 1998). Finally, by letter dated August 24,

1998, Mr. Van Syoc informed Mr. Ercole that "I will be back from my vacation in Vermont on August 31, 1998, and am hopeful that you will be in a position to advise me as to whether there is a prospect for this case to be settled in a fair settlement range, which will be well into the six figures." Defs.' App. at Exh. D (Letter, Clifford L. Van Syoc, Esq. to Charles A. Ercole, Esq., dated August 24, 1998).

From the tenor of this correspondence, I conclude that Mr. Van Syoc's primary and possibly only interest in pursuing this litigation was in obtaining his attorneys' fees, as opposed to reaching an equitable result for his client. The "posturing" reflected in Mr. Van Syoc's correspondence had no basis in fact or law. This being the case, it would be manifestly unfair to burden Mr. Van Syoc's clients with the fees Defendants incurred as a result of Mr. Van Syoc's continued refusal to consider a reasonable settlement offer. I base my conclusion that Mr. Van Syoc's settlement demands were unreasonable on the fact that not only this Court, but also the Court of Appeals, found that Murphy's claims were not supported by even a "scintilla" of evidence. *Murphy*, 32 F.Supp.2d at 756; *Murphy*, 208 F.3d 206 (3d Cir.2000). Indeed, Mr. Murphy testified that: "I provided the facts pertaining to my claim to my attorney, Clifford L. Van Syoc, Esquire, and *relied in good faith upon his legal advice as to whether those facts amounted to a valid claim.*" Murphy Cert. at ¶ 2 (emphasis added). Mr. Murphy should not be penalized for his reliance on the advice of an attorney who was more interested in his own attorneys' fees than in the merits of his clients' case. Because fees awarded under § 1988 may only be assessed against the losing party, as opposed to his attorney, this Court declines to award Defendants' attorneys' fees under 42 U.S.C. § 1988.

Appendix B

B. 28 U.S.C. § 1927

1. Governing Standards of Law

While 42 U.S.C. § 1988 has been construed to cover only attorneys' fees assessed against a losing party, 28 U.S.C. § 1927 contains a provision which allows the court to award counsel fees against an attorney. This section provides, in relevant part as follows:

> § 1927. Counsel's Liability for Excessive Costs
>
> Any attorney or other person admitted to conduct cases in any court or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiples the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

28 U.S.C. § 1927. This section is not limited by, but exists in addition, to other sanctioning regimes such as Rule 11. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991).

The Third Circuit has held that due process requires that "[p]rior to sanctioning an attorney, a court must provide the party to be sanctioned with notice of and some opportunity to respond to the charges." *Jones v. Pittsburgh Nat. Corp.*, 899 F.2d 1350, 1357 (3d Cir.1990) (citing, *inter alia*, *Knorr*

Brake Corp. v. Harbil, Inc., 738 F.2d 223, 227-28 (7th Cir. 1984) (§ 1927 case stating the "court should provide counsel with some opportunity to be heard")); *see also Anjelino v. New York Times Co.*, 200 F.3d 73, 100 (3d Cir.1999).

As noted previously, this Court heard oral argument on Defendants' Application for Counsel Fees on February 16, 2001. *See* Minute Entry, Civ. No. 97-1558, February 16, 2001 (Docket Entry No. 50). At oral argument, the Court raised the question of the imposition of attorneys' fees under 28 U.S.C. § 1927 against Mr. Van Syoc personally with counsel for both parties, and instructed Mr. Van Syoc to file a supplemental brief on the question of whether the Court should award Defendants' attorneys' fees pursuant to 28 U.S.C. § 1927 against Mr. Van Syoc. Mr. Van Syoc filed a supplemental letter brief addressing this issue with the Court on March 2, 2001. Accordingly, Mr. Van Syoc has undisputedly had adequate notice and an opportunity to be heard on the Court's consideration of the imposition of attorneys' fees under 28 U.S.C. § 1927. *See Eash v. Riggins Trucking, Inc.*, 757 F.2d 557, 570 (3d Cir.1985).

The Third Circuit has held that "a bad faith finding is required as a precondition to the imposition of attorneys' fees under section 1927." *Baker Industries, Inc. v. Cerberus Ltd.*, 764 F.2d 204, 208 (3d Cir.1985); *see also Hackman v. Valley Fair*, 932 F.2d 239, 242 (3d Cir.1991) (bad faith is a "prerequisite" under 28 U.S.C. § 1927). Before assessing attorneys' fees under § 1927, a District Court should find that the attorney to be so sanctioned acted willfully, and identify the conduct which constituted bad faith. *Baker Industries*, 764 F.2d at 209. "This bad faith requirement is

seen as necessary to avoid chilling an attorney's legitimate ethical obligation to represent his client zealously[.]" *Id.* at 208.

"Bad faith" in the context of 28 U.S.C. § 1927 may be shown through "the intentional advancement of a baseless contention that is made for an ulterior purpose, *e.g.*, harassment or delay." *Ford v. Temple Hosp.*, 790 F.2d 342, 347 (3d Cir. 1986); *see also Hicks v. Arthur*, 891 F.Supp. 213, 215 (E.D.Pa.1995) (holding that "[bad faith] can be demonstrated either by showing an ulterior motive, or misconduct such as knowingly using perjured testimony, citing as binding authority overruled or non-binding cases, or otherwise misrepresenting facts or law to the court.") Furthermore, "[w]hen a claim is advocated despite the fact that it is patently frivolous or where a litigant continues to pursue a claim in the face of an irrebuttable defense, bad faith can be implied." *Loftus v. Southeastern Pennsylvania Tranp. Auth.*, 8 F.Supp.2d 458, 461 (E.D.Pa.1998), *aff'd*, 187 F.3d 626 (3rd Cir.1999), *cert. denied*, 528 U.S. 1047, 120 S.Ct. 581, 145 L.Ed.2d 483

Applying these standards to Mr. Van Syoc's conduct during the course of this lawsuit, I conclude that he acted in bad faith by "multipl[ying] the proceedings in [this] case unreasonably and vexatiously." 28 U.S.C. § 1927. I base this conclusion on the following considerations: (1) Mr. Van Syoc's pursuit of baseless claims, the frivolous nature of which he should have been aware by, at the latest, the Defendants' filing of their motion for summary judgment on August 17, 1998; and (2) Mr. Van Syoc's assertion of Roseann Murphy's *per quod* claim under the New Jersey Law Against Discrim-

ination, N.J.S.A. § 10.5-1 *et seq.*, and Title VII, 42 U.S.C. § 2000e *et seq.*, when both federal and New Jersey state courts had already held that *per quod* claims were not cognizable under either of those sources of law.

2. Van Syoc's Pursuit of Frivolous Litigation on Baseless Claims

To appreciate fully the nature of Mr. Van Syoc's conduct in pursuing this frivolous litigation, it is necessary to review the claims which he asserted on behalf of Mr. Murphy and the evidence, or rather, the shocking absence of evidence, which was offered in support of Mr. Murphy's claims. To do so, I shall return to my opinion granting Defendants' motion for summary judgment in this case, *Murphy v. Housing Authority and Urban Redevelopment Agency of the City of Atlantic City*, 32 F.Supp.2d 753 (D.N.J.1999).

Murphy alleged that he was the victim of "reverse discrimination" on the basis of his race and sex, in violation of Title VII and the NJLAD. As I explained at length in my earlier opinion, Murphy based his allegations on claims that: (1) he was denied a promotion and salary increase which he requested and to which he felt he was entitled; and (2) his supervisors refused to send him to a course at his employer's expense.

In evaluating Murphy's claim that he was denied promotion(s) and salary increase(s), based on "reverse discrimination," this Court reviewed Murphy's salary history. Murphy began his employment with the Authority in the position of Accounting Assistant on February 13, 1991,

with an annual starting salary of $ 16,040. *Murphy*, 32 F.Supp.2d at 756. In April, 1991, Murphy received a 5% pay raise. *Id.* In November, 1991, Murphy received a $1000 raise. *Id.* at 756-757. In early 1992, Murphy was promoted to Full-time Accountant, and received a 10% raise. *Id.* at 757. Murphy's raise was in keeping with the Authority's promotion policy, which provided that all promoted employees would receive a raise of 10% of their present salary, or a raise bringing the promoted employee's salary to the entry level salary of the new position. *Id.* Murphy received an additional 5% raise in April, 1992; a $2,200 raise in December 1992 for taking on additional responsibilities; and an annual raise of 5.9% in April 1993. *Id.* In April, 1994, Murphy was promoted to Senior Accountant and received a 10% raise. *Id.* In April 1994, Murphy received a 5% annual raise. *Id.*

On September 1, 1995, Murphy sent a memorandum to the Executive Director of the Authority, requesting a promotion to the position of Supervising Accountant. *Id.* At the time he requested this promotion, Murphy was making $30,823.48 per annum; with the standard 10% salary increase associated with the promotion, Murphy would have made $33,905.76 per annum. Murphy, however, requested an exception to the Authority's standard 10% increase, and asked for a raise in excess of $19,550, which, if granted, would have brought his salary to $50,375. *Id.* The requested raise would also have placed Murphy at a salary level above his immediate supervisor, the Authority's Comptroller, Robert Lawless, who received an annual salary of $40,180. *Id.*

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The Authority's Board of Commissioners considered Murphy's request at a Board Meeting held on September 28, 1995. At the meeting, John Glowacki, the Authority's Director of Administration, made the following comments regarding Murphy's request:

> There is no question about this man's competence, or ability, or interest. He's one of the best employees I have. The problem is that there's—he's asking for additional money beyond what the personnel policy permits. [The][p]ersonnel policy now says, that when you're promoted you get a 10 percent increase, or, you move to the lowest [salary] level of the next job. In his case, he'll get a 10 percent increase. He was asking for consideration to take him beyond that. And, he was using as a precedent the item in our personnel policy that permits us to take new employees, when we hire them, and consider their experience and where it exceeds the minimum requirement, to give five percent for each year, beyond which, you know, their experience takes them. We never put a provision in there to enable that for people getting a promotion. . . . I think it's a bad move. I think as long as we have the provision in there that takes into consideration the experience at the time of hire, if a person moves on and gets promoted, that's already been considered. And, at the time of promotion there would be no need to consider it a second time. That's my opinion.
>
> . . . .

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> I'm afraid . . . that if you do this in one instance you're going to have a rash of incidents. And every time somebody comes up for promotion, you're going to have to go through heart rendering [sic] discussion. And, you know, I like this guy. I would love to do and I've already promoted him several times in recognition of his good work.
>
> . . . .
>
> But I don't want to recommend it as a whole salary change and in his case I think we have to draw the line there. I know he's going to be angry but I think that's what we have to do. That's my opinion.

Murphy, 32 F.Supp.2d at 758-759 (quoting Transcript of the Authority's Board Meeting, Executive Session, dated Sept. 28, 1995). The Executive Director of the Authority, John J. McAvaddy, agreed, stating: "[Murphy is] a good employee. He's a hard worker. Do anything you ask him to do. Take on additional work, but . . . it's hard for us to come up with a justification that's within the purview [of the policies] that you [the Board of Commissioners,] have given us." *Id.* Later that month, Murphy was promoted to Supervising Accountant. The Board declined his request for an exception to the promotion policy, and Murphy received the standard 10% raise. *Id.*

Murphy also alleged that the Authority's refusal to pay for him to take a municipal accounting course was further evidence of the reverse discrimination to which he was

subjected. The Court, reviewing the circumstances surrounding this denial, found that on August 29, 1994, Murphy requested that the Authority pay his tuition for a course entitled Municipal Finance Administration. *Id.* at 760. Glowacki denied Murphy's request because Glowacki determined that having Murphy take the course would not be beneficial to the Authority. *Id.*[2] Glowacki explained the

2. Glowacki's testimony was as follows:

> Q. So, it would be your claim you did not [deny the request to attend the Municipal Finance Administration course] arbitrarily or capriciously; right?
>
> A. Yes.
>
> Q. Tell us about the process [you employed in denying Murphy's request].
>
> A. Look at the—the courses that are being requested, determine what value it has to the Authority, does [the Authority] need it; and, if it doesn't, say no. . . . Or, if it's needed, say yes. . . . And if I said yes, it would then go to the executive director for final approval ...
>
> Q. So you mentioned that you discussed [the course with Murphy,] and [he] told you he wants to get his municipal financing credentials. Did you then respond to him in some way by saying, "You don't need that," or anything else?
>
> A. I told him I didn't think it was necessary [because "[m]unicipal accounting is not what we do at the [A]uthority."]

Murphy, 32 F.Supp.2d at 760 (citing Glowacki Dep.).

circumstances in detail, and reiterated that he denied Murphy's request not because of his race, but because Murphy already had the accounting courses necessary for the work he was performing. *Id.* at 761.

> Q: . . . Why did you determine that Mr. Murphy would not benefit from the same course?
>
> A: Because he already had the accounting courses necessary for the work he was performing.
>
> [And] I had intended to send him to the course that was specific to HUD [accounting].
>
> . . . . .
>
> . . . . .
>
> [The Authority] wouldn't benefit from [sending Murphy to] the [municipal finance] course. . . .

Murphy, 32 F.Supp.2d at 761 (citing Glowacki Dep. at 54-55).

Reviewing Murphy's claim for unlawful reverse discrimination in light of these facts, this Court held that Murphy had failed to make a prima facie case of reverse discrimination:

> [T]he evidence in the summary judgment record clearly demonstrates that Murphy, a white male, was repeatedly promoted within the Authority, that Murphy received numerous raises consistent with the Authority's personnel policies, and that both

Glowacki and McAvaddy considered Murphy to be an exemplary employee. *See* Def. Brief, Exh. A; *see also* Pl. Cert., Exh. F. Specifically, at the Board of Commissioner's meeting on September 28, 1995, Glowacki stated that "[t]here [was] no question about [Murphy's] competence, or ability, or interest. [Murphy is] one of the best employees I have." *See* Pl. Cert., Exh. F. at 2. In addition, at the same meeting, McAvaddy informed the Board of Commissioners that, given the poor health of Robert Lawless, Murphy was in line to be promoted to Comptroller of the Authority. *See id.* at 5.

This Court cannot reasonably conclude that while Glowacki and McAvaddy considered Murphy an outstanding employee who eventually would assume the highest accounting position at the Authority, they were also conspiring to discriminate invidiously against him because of his race. Such an inference from the evidence of record is particularly unreasonable, given that Glowacki and McAvaddy hired Murphy, recommended him for numerous promotions, and praised him before the Board of Commissioners. Moreover, Glowacki is of the same race and gender as Murphy. *See Ditzel*, 962 F.Supp. at 604 (stating that "this Court . . . is skeptical that plaintiff, a white male, can establish that he suffered reverse race discrimination at the hands of his white supervisor").

Murphy, 32 F.Supp.2d at 765-66.

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As reflected in the above language cited from my earlier Opinion in this case, it was clear to this Court that at the time Defendants' summary judgment motion was filed, there were absolutely no legitimate grounds whatsoever for the Plaintiff's pursuit of his claims of reverse discrimination. Indeed, as I noted: "Murphy's certification in opposition to Defendants' motion for summary judgment does little more than 'replace conclusory allegations of the complaint . . . with conclusory allegations of [the certification].'" *Id.* (citing *Lujan v. Nat'l Wildlife Federation*, 497 U.S. 871, 888, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990)).

Furthermore, I reached the same conclusion with respect to Murphy's claim of gender discrimination:

> For the same reasons as set forth [ ] above, I conclude that Murphy has failed to establish a prima facie case for unlawful reverse discrimination on the basis of gender. The record is completely devoid of any evidence of gender discrimination. Aside from the allegations in the Amended Complaint, there is nothing in the record that could reasonably support an inference of reverse gender discrimination.

Murphy, 32 F.Supp.2d at 767.

Given the paucity, indeed, the dearth, of any evidence whatsoever in the summary judgment record supporting Plaintiff's claims of reverse discrimination on the basis of race and sex, I conclude that Mr. Van Syoc's continued pursuit of this litigation constituted unreasonable and vexatious

conduct which so multiplied the proceedings in this case as to constitute bad faith and merit the award of counsel fees and costs under 28 U.S.C. § 1927. Mr. Van Syoc was, or should have been, aware of the complete lack of evidence supporting his client's claims no later than August 17, 1998, when Defendants filed their Motion for Summary Judgment, if not sooner. Even then, he opposed the motion for summary judgment, and continued to inform Mr. Ercole in writing that the case had a settlement value "well into the six figures." Defs.App., Exh. D (letter, Clifford Van Syoc, Esq. to Charles Ercole, Esq., dated August 24, 1998). *See Hicks v. Arthur*, 891 F.Supp. 213, 215 (E.D.Pa.1995) (imposing counsel fees pursuant to § 1927 on plaintiffs' attorney in civil rights litigation where counsel failed to produce evidence to support any of the claims in response to motion for summary judgment).

Mr. Van Syoc's cavalier disregard for the undisputed facts of this case and the applicable law is further demonstrated by his assertion of *per quod* claims on behalf of Roseann Murphy, Plaintiff's wife, based on the NJLAD and Title VII. In granting Defendants' motion for summary judgment, I summarily dismissed these claims, because, pursuant to federal and New Jersey State law, "*per quod* claims cannot be sustained under either the NJLAD, [or] Title VII." *Murphy*, 32 F.Supp.2d at 770 (citing *Jones v. Jersey City Medical Center*, 20 F.Supp.2d 770, 773 (D.N.J.1998) (Walls, J.)). Any potential assertion by Mr. Van Syoc that he was unaware of the state of the law at the time he filed Plaintiffs' claims is belied by the fact that he himself was counsel for the Plaintiffs in *Hurley v. Atlantic City Police Dep't*, 1995 WL 854478 (D.N.J.1995), a case in which my colleague, Judge Irenas,

flatly rejected an identical claim. *See Hurley*, 1995 WL 854478 at *15 (citing *Verde v. City of Philadelphia*, 862 F.Supp. 1329, 1337 n. 5 (E.D.Pa.1994) (Title VII); *Catalane v. Gilian Instrument Corp.*, 271 N.J.Super. 476, 499-500, 638 A.2d 1341, (App.Div.), *certification denied*, 136 N.J. 298, 642 A.2d 1006 (1994) (NJLAD)). Judge Irenas's holding in *Hurley* was subsequently affirmed by the Third Circuit, *see* 174 F.3d 95 (3d Cir.1999), and *cert. denied*, 528 U.S. 1074, 120 S.Ct. 786, 145 L.Ed.2d 663 (2000).

Finally, I find that Mr. Van Syoc's posturing in this case provides further evidence of his bad faith in pursuing this litigation. The settlement demands he made, which never dropped below $300,000 for a claim which, for the reasons I have set forth at length above and in my earlier Opinion, was objectively baseless, demonstrate complete disregard for the requirement that parties or their attorneys must evaluate discovered facts and intelligently analyze legal issues before the start of pretrial conferences. *Cf. In re Novak*, 932 F.2d 1397, 1405 (11th Cir.1991) (discussing important role played by pretrial settlement conferences in helping court and parties maximize limited resources though efficient management of litigation).

In the three-page Letter Memorandum, dated March 2, 2001, which he submitted at this Court's request in response to Defendants' Supplemental Application for Counsel Fees and Associated Expenses, Mr. Van Syoc, demonstrating his propensity for conclusory statements unsupported by the record, simply asserted, "[h]ere, no bad faith exists which would support the imposition of sanctions." Pl.s' Lett. Mem. at 3. This statement constitutes the *entirety* of Mr. Van Syoc's

argument as to why this Court should not require him to pay Defendants' attorneys' fees pursuant to 28 U.S.C. § 1927. *Id.* Needless to say, I do not find Mr. Van Syoc's argument, such as it is, persuasive.

For the reasons set forth above, I conclude that Mr. Van Syoc acted in a vexatious and unreasonable manner warranting an award of counsel fees and costs under § 1927. I note that § 1927 creates liability only for excess costs, expenses and attorneys' fees reasonably incurred because of the attorney's unreasonable and vexatious multiplication of the proceedings. 28 U.S.C. § 1927; *see Browning v. Kramer*, 931 F.2d 340, 344 (5th Cir.1991). As the Fifth Circuit explained in *Browning*,

> By its terms this statute does not authorize the wholesale reimbursement of a party for all of its attorneys' fees or for the total costs of the litigation. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 756 n. 3, 100 S.Ct. 2455, 65 L.Ed.2d 488, (1980); *Truck Treads, Inc. v. Armstrong Rubber Co.*, 868 F.2d 1472, 1474-75 (5th Cir.1989); *United States v. Blodgett*, 709 F.2d 608, 610-11 (9th Cir. 1983). Under §§ 1927, only those fees and costs associated with "the persistent prosecution of a meritless claim" may be awarded. *Thomas v. Capital Sec. Serv., Inc.*, 836 F.2d 866, 875 (5th Cir.1988) (en banc). Except when the entire course of proceedings were unwarranted and should neither have been commenced nor persisted in, an award under §§ 1927 may not shift the entire financial burden of an action's defense.

> *See Lewis v. Brown & Root, Inc.*, 711 F.2d 1287, 1292 (5th Cir.1983), clarified on reconsideration, 722 F.2d 209 (5th Cir.1984).

Browning, 931 F.2d at 344-45. Accordingly, I must determine at what point in time Mr. Van Syoc's conduct unreasonably multiplied the proceedings in this case.

While I strongly suspect that Mr. Van Syoc was aware of the total absence of a legitimate basis in law and fact for his clients' claims at the commencement of this litigation or very shortly thereafter, I am certain that he had this knowledge at the point at which the Defendants' filed their motion for summary judgment on August 17, 1998. Accordingly, I shall award counsel fees and costs to Defendants against Mr. Van Syoc pursuant to 28 U.S.C. § 1927 for reasonable counsel fees and associated expenses incurred by Defendants from the date on which Defendants filed their motion for summary judgment, August 17, 1998, through the date this Court granted Defendants' motion, on January 27, 1999.[3]

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3. I note that Defendants also requested counsel fees and associated costs for expenses incurred in their successful defense of this Court's holding on Plaintiffs' appeal to the United States Court of Appeals for the Third Circuit. *See* Defs.' Second Suppl.App. for Counsel fees and Assoc. Expenses at 3-6 (February 13, 2001). Whether such fees should be assessed against Mr. Van Syoc is an issue which must be decided by the Court that heard the appeal, in this case, the United States Court Of Appeals for the Third Circuit. As provided by the Federal Rules of Appellate Procedure:

> If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice

(Cont'd)

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3. Calculation of Fees to be Awarded

In calculating the amount of fees to be awarded, courts employ the "lodestar" formula, which requires multiplying the number of hours reasonably expended by a reasonable hourly rate. *Maldonado v. Houstoun*, 256 F.3d 181, 184 (3d Cir.2001). The applicant for fees has the burden of demonstrating that the claimed rates and number of hours expended are reasonable. *Id.* (citing *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 564, 106 S.Ct. 3088, 92 L.Ed.2d 439 (1986)). "In calculating the hours reasonably expended, a court should review the time charged, decide whether the hours set out were reasonably expended for each of the particular purposes described and then exclude those that are 'excessive, redundant, or otherwise unnecessary.'" *Maldonado*, 256 F.3d at 184 (citing *Public Int. Research Group of N.J., Inc. v. Windall*, 51 F.3d 1179, 1188 (3d Cir.1995)).

(Cont'd)

> from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

See Fed. R.App. P. 38. As the D.C. Circuit explained, "[i]t is for the Court of Appeals, not the district court, to decide whether Rule 38 costs and damages should be allowed in any given case." *In re American President Lines*, 779 F.2d 714, 717 (D.C.Cir.1985).

Accordingly, Defendants must present their Second Supplemental Application for Attorneys' Fees and Associated Expenses, covering attorneys' fees and cost incurred in defending the appeal, to the Court of Appeals. I intimate no view as to the merits of that Application.

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The reasonable hourly rate is calculated according to the prevailing market rates in the relevant community. *Id.* "The court 'should assess the experience and skill of the prevailing party's attorneys and compare their rates to the rates prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.' " *Id.* (citing *Rode v. Dellarciprete*, 892 F.2d 1177, 1183 (3d Cir.1990)). The party requesting fees "bears the burden of establishing by way of satisfactory evidence, 'in addition to [the] attorney's own affidavits,' . . . that the requested hourly rates meet this standard." *Id.* (citing *Washington v. Philadelphia Cty. Ct. of Common Pleas*, 89 F.3d 1031, 1035 (3d Cir.1996)). The Third Circuit has held that "[t]he starting point in ascertaining a reasonable hourly rate is the attorney's usual billing rate, but this is not dispositive." *Id.* at 183-84 (citation omitted).

a. Reasonable Hours Expended

Defense counsel submitted detailed billing statements which describe the hours counsel expended on this litigation. *See* Defs.' App. at Exh. H (Billing Records). Unfortunately, defense counsel failed to specify the identity or qualifications of several of the individuals whose names appear on their billing records relating to this case. Indeed, counsel for the Defendants have provided evidence only as to the identities and qualifications of Charles A. Ercole, Esq., Stephen G. Raymond, Esq., and C. Alexa Abowitz, Esq. *See* Defs.' App. at 12 (identifying these attorneys as those who "performed the overwhelming majority of work in this case"); Defs.' App., Exh. B. (Ercole Aff.) at ¶ 1 (same) and Exh. H (billing records). Accordingly, I shall consider only the hours expended by these three attorneys.

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Between August 17, 1998, the date on which Defendants moved for summary judgment, and January 27, 1999, the date on which this Court granted Defendants' motion for summary judgment, Defendants' counsels' billing records indicate that the following attorneys billed the following hours to this case:

Charles A. Ercole	133.5 hours
Stephen G. Raymond	241.4 hours
C. Alexa Abowitz	5.2 hours
Total	380.1 hours

Thus, the billing records reveal that counsel for the Defendants worked a total of 380.1 hours on this case between August 17, 1998 and January 27, 1999. *See* Defs.' App. Exh. H. This included preparing for and attending the final pre-trial conference; continuing settlement negotiations; and preparing for trial, which was scheduled for February 1, 1999, including legal research, preparing trial exhibits, preparing jury instructions, drafting motions *in limine*, meeting with witnesses, and drafting a trial brief. *Id.* I find that the hours billed by defense counsel for these activities, the bulk of which involved trial preparation, are reasonable. Moreover, I note that Mr. Van Syoc has not challenged Defendants' fees except to contend that discovery is necessary. For the reasons set forth in the margin, I reject Mr. Van Syoc's contention that discovery is necessary or appropriate.[4]

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4. In his Brief in Opposition to Defendants' Motion for Counsel Fees, Mr. Van Syoc argued that "should the Court determine that the movants have established their entitlement to an award, plaintiffs

(Cont'd)

Additionally, counsel for Defendants incurred $2330.60 in out-of-pocket costs associated with this litigation between September 1, 1998 and January 27, 1998.[5] These costs included copying and binding; postage and Federal Express; telephone and fax; and LEXIS research. I find these costs, incurred

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(Cont'd)

respectfully request discovery, in light of issues of fact as to whether the services claimed to have been rendered were in fact rendered," Pl.'s Br. at 8. Mr. Van Syoc is referring to the fact that counsel for the Defendants inadvertently included the name of a co-employee of plaintiff, Ms. Sharon Miller, on a list of witnesses interviewed by counsel for the Defendants on September 30, 1998. Ms. Miller was not in fact interviewed on that date. Counsel for the Defendants submitted an Affidavit explaining that while counsel had planned to interview Ms. Miller on that day, she was unavailable. Defs.' Reply. Br., Exh. A (Ercole Aff.). Counsel testified that he nonetheless spent the 8.5 hours reflected in the billing records for that date interviewing other witnesses and performing other tasks relating to this case. *Id.* at ¶ 6. I find this explanation entirely reasonable. Indeed, the fact that Mr. Van Syoc would have this Court and Defendants engage in further discovery on this particular claim which is based on a typographical error of no consequence, when there is no evidence in the record whatsoever to support an inference that counsel for Defendants falsified their billing records, and the error did not actually affect the amount billed, is but further evidence of Mr. Van Syoc's vexatious approach to this litigation.

5. This calculation does not include costs expended during August, 1998, because the billing and expense records submitted by Defendants contain data aggregated only by month, as opposed to by date. Therefore, I cannot determine when, or for what activity, counsel for Defendants incurred the costs listed for August. Accordingly, I am including only those costs incurred between September 1, 1998, and January 27, 1999 in the calculation of costs.

over five months' of trial preparation, to be reasonable. Once again, Mr. Van Syoc has not challenged the reasonableness of these costs. Accordingly, I shall award Defendants costs in the amount of $2,330.60.

b. Hourly Rate

Having determined that the number of hours which counsel for Defendants expended was reasonable, the Court must now decide whether the hourly rate requested by counsel for Defendants is reasonable. *Maldonado*, 256 F.3d at 184. Counsel for the Defendants requested an hourly rate of $150. To support this rate, counsel submitted an affidavit describing the education and experience of Mr. Ercole, who, at the time this petition was filed, was a sixth year attorney. *See* Defs.' App. at Exh. B (Ercole Aff.). Additionally, Mr. Ercole has noted that Mr. Raymond "is a seasoned trial attorney who spent fifteen years with the Burlington County Prosecutor's Office," prior to which he had his own private practice. Defs.' App. at 12. Finally, Ms. Abowitz was a fourth year associate at the time this litigation occurred. *Id.*

According to Mr. Ercole's Affidavit, his time was then typically billed at $175/hour, and Mr. Raymond's time was then billed at $165/hour. Defs'.App., Exh. B at ¶ 6. Ms. Abowitz's time was then billed at $140/hour. Messrs. Ercole and Raymond and Ms. Abowitz were then associates at Montgomery, McCracken, Walker & Rhoads, LLP, which contracted to provide legal services to the Defendants at the rate of $150/hour. *Id.* at ¶ 6 and n. 1. The Defendants' insurance carrier pays a maximum hourly rate of $125/hour;

however, the Defendants agreed to pay the additional $25/hour for the time of Messrs. Ercole and Raymond. Defs.' App. at 13, n. 6.

Given their respective levels of experience, I find that $150/hour is a reasonable hourly rate for Messrs. Ercole's and Raymond's time, and $125/hour is a reasonable hourly rate for Ms. Abowitz's time. *See Lewis v. Babbitt*, 1999 WL 551878 at *2 (E.D.Pa.1999) (finding, in civil rights case, that hourly rate of $150/hour would be reasonable for mid-level associate in Philadelphia area); *Brennan v. Springfield Tp.*, 1998 WL 792180 (E.D.Pa.1998) (finding that hourly rate of $200 for plaintiff's primary counsel and $125 for associates in civil rights case was reasonable).

c. Calculation of the Lodestar

For the reasons set forth above, I calculate the lodestar amount for Defendants' attorneys' fees in this case as follows:

Charles A. Ercole	$150/hour x 133.5 hours =	$20,025
Stephen G. Raymond	$150/hour x 241.4 hours =	$36,210
C. Alexa Abowitz	$125/hour x 5.2 hours =	$ 650
	TOTAL =	$56,885

Accordingly, I find that Defendants are entitled to a total of $56,885 in attorneys' fees. Adding the $2,330.60 of costs to which I found Defendants to be entitled, the total amount of attorneys' fees and costs to be assessed against Mr. Van Syoc personally is $59,215.60.

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ORDER

This matter having come before the Court on the Application of Defendants for Counsel Fees and Associated Expenses, pursuant to 42 U.S.C. § 1988 and/or 28 U.S.C. § 1927, Charles A. Ercole, Esq., Klehr, Harrison, Harvey, Branzburg & Ellers, LLP, appearing on behalf of Defendants, Housing Authority and Urban Redevelopment Agency of the City of Atlantic City, John Glowacki, John J. McAvaddy, Jr., and John P. Whittington, Clifford L. Van Syoc, Esq., Van Syoc Law Offices, Chartered, appearing on behalf of Plaintiffs, Todd Murphy and Roseann Murphy; and,

The Court having considered the Application for Counsel Fees and Associated Expenses submitted by counsel for the Defendants, and the opposition submitted by Mr. Van Syoc, as well as the oral argument of counsel; and,

This Court having found that Counsel for the Plaintiffs, Clifford L. Van Syoc, Esq., multiplied the proceedings in this case unreasonably and vexatiously in a manner that demonstrates bad faith in violation of 28 U.S.C. § 1927;

For the reasons set forth in the Opinion filed simultaneously with this Order, IT IS on this 27th day of August, 2001, hereby ORDERED that:

1. Defendants' Application for Counsel Fees and Associated Expenses shall be GRANTED pursuant to 28 U.S.C. § 1927; and,

2. Within 30 days of the date of this Order, counsel for Plaintiffs, Clifford L. Van Syoc, Esq., shall pay counsel fees to the Defendants in the amount of $56,885, and costs in the amount of $2,330.60, or a total of $59,215.60.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED DECEMBER 13, 2002

THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 01-3426

TODD MURPHY; ROSEANN MURPHY,

husband an wife

v.

HOUSING AUTHORITY AND URBAN REDEVELOPMENT AGENCY OF THE CITY OF ATLANTIC CITY, a New Jersey municipal corporation; JOHN GLOWACKI, an individual; JOHN J. MCAVADDY, JR., an individual; JOHN P. WHITTINGTON, an individual; JOHN DOES 1 THROUGH 15, inclusive, fictitious named defendants, jointly, severally, and in the alternative

*Clifford L. Van Syoc,

Appellant

*(Pursuant to F.R.A.P. 12(a))

* (Dismissed as per Court's 10/21/02 Order)

Appendix C

No. 01-3572

* TODD MURPHY; ROSEANN MURPHY,

husband an wife

v.

HOUSING AUTHORITY AND URBAN REDEVELOPMENT AGENCY OF THE CITY OF ATLANTIC CITY, a New Jersey municipal corporation; JOHN GLOWACKI, an individual; JOHN J. MCAVADDY, JR., an individual; JOHN P. WHITTINGTON, an individual; JOHN DOES 1 THROUGH 15, inclusive, fictitious named defendants, jointly, severally, and in the alternative

Housing Authority and Urban Redevelopment Agency of the City of Atlantic City;
John Glowacki;
John J. McAvaddy, Jr.;
John P. Whittington,

Appellants

* (Dismissed as per Court's 10/21/02 Order)

Appendix C

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civ. No. 97-cv-01558)

SUR PETITION FOR REHEARING

BEFORE: BECKER, *Chief Judge*,
SLOVITER, SCIRICA, NYGAARD, ALITO, ROTH,
MCKEE, RENDELL, BARRY, AMBRO, FUENTES,
SMITH and MAGILL, *Circuit Judges*[1]

The Petition for rehearing filed the Appellant, Clifford L. Van Syoc, in the above-entitled matter, having been submitted to the judges who participated in the decision of this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by this court en banc, the Petition for Rehearing is hereby DENIED.

It is so ordered.

By the Court,

s/ [illegible]
United States Circuit Judge

DATE: 12 DEC 2002

1. The Honorable Frank Magill, Circuit Judge of the United States Court of Appeals for the Eight Circuit, sitting by designation. Judge Magill's vote is limited to panel rehearing only.

APPENDIX D — LETTER OF CHARLES A. ERCOLE DATED OCTOBER 12, 1999

KLEHR, HARRISON, HARVEY, BRANZBURG
& ELLERS LLP

ATTORNEYS AT LAW
260 S. BROAD STREET
PHILADELPHIA, PA 19102-5003

October 12, 1999

Mr. Ernie Burgeson
Claim Examiner
Housing Authority Insurance
P.O. Box 189
Cheshire, CT 06410-0189

RE: *Todd Murphy v. Atlantic City Housing Authority*

Dear Ernie:

This letter is in response to our recent telephone conversation and your request that we set forth the likelihood of each of three alternatives we outlined in our previous correspondence regarding Todd Murphy's appeal in light of the Third Circuit's recent decision in *Lademarco* wherein the Court held that the "unusual employer" standard should not be used in reverse discrimination cases. We had indicated that there are three distinct possibilities at this point:

1. The Third Circuit will affirm the decision on its own based on the facts in the record and under what it has deemed the appropriate standard of review;

2. The case will be remanded to the District Court who will then review the case under the new standard and again grant summary judgment; or

3. The case will be remanded to District Court which will deny summary judgment and instead require that the case proceed to trial.

The likelihood that the Third Circuit will affirm the judgment under the new standard or under some of the alternative grounds that we set forth in our opposition to plaintiffs' appeal is 15% or less. Our opinion is based on the fact that Judge Orlofsky's District Court opinion, although lengthy and well reasoned, was based on a standard that has since been rejected by the Third Circuit. Therefore, it would require extensive analysis of the facts by the Third Circuit — a function that is more appropriately reserved to the District Court. However, we argued that even under this alternative standard, Murphy's case should be dismissed by the Court. We also noted to the Third Circuit that the District Court did not even address the "same actor" defense — that is, Murphy was hired by the same people, John Glowacki and John McAvaddy, who later denied him his request for a raise in 1995. Many circuit courts have held that this is a presumption a plaintiff must overcome in order to pursue a discrimination case.

The most likely scenario is that the Third Circuit will remand the case to the District Court, which will examine the facts under the new standard. In light of Judge Orlofsky's strong opinion, we believe there is a better than 50%-60%

chance that he will again dismiss the case and grant our motion for summary judgment.

Finally, there is a 25%-35% chance that the case will be remanded to District Court which will deny the motion for summary judgment and require the parties to proceed to trial. Again, however, we should be encouraged because the case will be tried before the same judge — Orlofsky — who displayed his thoughts about Mr. Murphy's case in granting our motion for summary judgment.

We trust the foregoing is helpful. If you have any questions or need additional information, please do not hesitate to contact me.

Very truly yours,

s/ Charles A. Ercole
Charles A. Ercole

Supreme Court, U.S.
FILED
JUN 16 2003
OFFICE OF THE CLERK

No. 02-1668

IN THE

Supreme Court of the United States

CLIFFORD L. VAN SYOC, ESQUIRE,

Petitioner,

v.

HOUSING AUTHORITY AND URBAN REDEVELOPMENT AGENCY OF THE CITY OF ATLANTIC CITY, a New Jersey municipal corporation; JOHN GLOWACKI; JOHN J. McAVADDY, JR.; and JOHN P. WHITTINGTON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS FOR REVIEW

1. Whether the District Court properly ordered, and the Court of Appeals properly affirmed the award of attorneys' fees pursuant to 28 U.S.C. § 1927 against an attorney who callously disregarded his obligations to the court, his adversary and his client where the decision is supported by the undisputed record and applicable legal principle, is not inconsistent with decisions by other United States courts of appeal, and does not implicate the Court's supervisory power.

2. Can Petitioner challenge the amount of fees and costs the District Court properly awarded, and the Court of Appeals properly affirmed, where Petitioner failed to challenge the amount of attorneys' fees and costs sought before the District Court.

3. Whether the amount of the District Court's award of attorneys' fees and costs incurred as a result of Petitioner's continued prosecution of claims which he knew had no factual or legal basis was appropriate where the District Court performed a thorough analysis of the fees and costs sought, awarding some, but not all, of the fees and costs requested.

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STATEMENT OF THE CASE

Petitioner, Clifford Van Syoc, Esquire ("Petitioner" or "Van Syoc"), an experienced attorney who represents plaintiffs in civil rights/employment discrimination cases on a daily basis, represented Todd Murphy, a white male, and his wife Roseann Murphy (hereinafter "Plaintiffs") in a discrimination suit against Mr. Murphy's employer, the Housing Authority and Urban Redevelopment Agency of the City of Atlantic City, and Mr. Murphy's supervisors John Glowacki, John J. McAvaddy, Jr. and John P. Whittington (collectively "Respondents"). From the beginning of the case, it was clear that there was no legal basis for Plaintiffs' claims. Plaintiffs' claims of discrimination were: (1) Respondents' denial of Mr. Murphy's request to raise his salary over 60 percent from $30,794.14 to $50,375.00; and (2) Respondents' denial of Mr. Murphy's request to attend and be reimbursed for municipal finance classes that did not apply to Mr. Murphy's job title and were not required for the performance of Mr. Murphy's duties.[1] *Murphy v. Housing Auth. and Urban Redevelopment Agency of the City of Atlantic City*, 32 F. Supp. 2d 753, 757-58 (D.N.J. 1999) ("Murphy Summary Judgment"). It was also clear from early on in the litigation, that Plaintiffs' factual allegations were simply wrong and there were no facts that supported Plaintiffs' claims. Despite this, Petitioner continued to prosecute claims that he knew or should have known were without basis.

Respondents filed a motion for summary judgment on August 17, 1998. (JA 92 *et seq.*) On January 27, 1999, the District

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1. Contrary to statements in the Petition (*see Pet.* at pp. 1-2), requests such as Plaintiff's have never been routinely granted and were denied to Plaintiff because they were not warranted or appropriate, not to "make a stand." (JA 92 *et seq.*)

Court issued an opinion and order granting Respondents' motion for summary judgment on all counts holding:

> I shall grant the Defendants' motion for summary judgment on Counts I, II, and IV of the Amended Complaint because Murphy cannot establish a prima facie case of unlawful reverse discrimination in violation of Title VII or the New Jersey Law Against Discrimination ("NJLAD") *AND, ALTERNATIVELY*, because Murphy has failed to produce *even a scintilla of evidence* tending to show that the Defendants' proffered nondiscriminatory reasons for the adverse employment decisions were merely a pretext for invidious discrimination. In addition, I shall grant Defendants' motion for summary judgment on Count III of the Amended Complaint because *per quod* claims are not cognizable in cases involving claims of employment discrimination in violation of Title VII and the NJLAD, and because as a derivative claim, a *per quod* claim cannot survive if the underlying claim fails. (Emphasis added).

Murphy Summary Judgment, 32 F. Supp. 2d at 755. This decision was affirmed by the Court of Appeals for the Third Circuit. *Murphy v. Housing Auth. and Urban Redevelopment Agency of the City of Atlantic City*, 208 F.3d 206 (3d Cir. 2000).

The Respondents filed a request for reimbursement of attorneys' fees and costs against Plaintiffs and Petitioner pursuant to 42 U.S.C. § 1988 and 28 U.S.C. § 1927[2] in February 1999. (JA 444). On August 27, 2001, the United States District Court for the District of New Jersey granted Respondents' request in part finding that

2. Contrary to Petitioner's claims at page 2, there was nothing improper about defendants' request for counsel fees and expenses.

Petitioner had "callously disregarded his professional obligations to this Court, his adversary, and his clients . . . has in bad faith turned a blind eye to the facts and law and has unreasonably and vexatiously multiplied the proceedings in the case." *Murphy v. Housing Auth. and Urban Redevelopment Agency of the City of Atlantic City*, 158 F. Supp. 2d. 438 (D.N.J. 2001) ("Murphy Fees") (App. B to Pet.).[3] Respondents' request for fees against Plaintiffs was denied. *Id.* The Third Circuit affirmed the District Court's decision finding Petitioner's claims of abuse of discretion and clear error "specious." *Murphy v. Housing Auth. and Urban Redevelopment Agency of the City of Atlantic City*, Nos. 01-3426 and 01-3572 (3d Cir. Oct. 16, 2002) (App. A to Pet.). The Third Circuit specifically affirmed the District Court's finding that Petitioner had acted in bad faith. *Id.*

On November 12, 2002, the Third Circuit also granted, in part,[4] Respondents' application for fees and costs pursuant to Federal Rule of Appellate Procedure 38. These fees and costs related to defense of Petitioner's appeal of the August 27, 2001 Opinion and Order awarding fees pursuant to § 1927. Contrary to Petitioner's statement in the Petition at page 3, this Order was not issued before Petitioner's response was due. In fact, Petitioner filed a response to Respondents' motion on November 12, 2002.

---

3. The District Court did not "expressly den[y] defendants' application for attorney's fees and costs in connection with the appeal," but deferred the decision on those fees to the court of appeals. *Murphy Fees*, 158 F. Supp. 2d at 451 n.3.

4. Respondents requested $33,431.96 in fees and costs incurred as a result of Petitioner's frivolous appeal. The Third Circuit awarded $15,000.00 in fees and $3,698.46 in costs.

REASONS FOR DENYING THE PETITION

Forsyth v. City of Hammond, 166 U.S. 506 (1897), cited in the Petition at page 5 does not support granting the Petition. In *Forsyth*, this Court reaffirmed the uncontroversial position that "the power of this court in certiorari extends to every case pending in the circuit courts of appeal and may be exercised at any time during such pendency." *Id.* at 514. The Court went on to recognize another uncontroversial position, that

> it is a power which will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between courts of appeal and the courts of a state, or some matter affecting the interests of this nation in its internal or external relations, demands such exercise.

Id. at 514-15. None of those circumstances are present here. First, there are no inconsistent decisions between the Third Circuit and any other courts of appeals on the issues raised in the Petition. Second, the lower courts' decisions were consistent with previous precedent and do not require this Court to exercise its supervisory power. Finally, there are no matters of national interest or exceptional importance implicated in the writ requiring this Court's attention.[5]

5. Petitioner's citation to *Patton v. Yount*, 467 U.S. 1035 (1984) is curious since that case has no relevance to the matters raised in the Petition. Furthermore, there has been no showing that the matters raised in the Petition, specifically whether the award of attorneys' fees and costs against Petitioner pursuant to 28 U.S.C. § 1927 are "important and recurring." While it may be true that courts are "flooded with civil rights claims arising under 42 U.S.C. § 1983" (*see Pet.* at p. 8), it is not true that those cases necessarily implicate the imposition of sanctions under 28 U.S.C. § 1927. The fee-shifting procedure under 42 U.S.C. § 1988 is not at issue here. What is at issue is the imposition of sanctions against an attorney who unreasonably and vexatiously multiplies the proceedings. *See* 28 U.S.C. § 1927.

As noted in this Court's rules, "a petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *See* Rule 10. Petitioner's assertions are essentially that the lower courts misapplied the law to the specific facts. As set forth herein, this is not the case and this is not one of those rare circumstances requiring this Court's attention.

I. Petitioner's Discussion Of And Reliance Upon An Attorney-Client Communication Is Improper And Should Be Rejected By This Court.

Despite repeated demands by defense counsel and previous instructions from the District Court, Petitioner continues to disclose and rely upon an attorney-client communication between Respondents' counsel and Respondents' insurance carrier. *See* App. D to Pet. There is no doubt that the correspondence is privileged.[6] There is also no doubt that Petitioner's continued discussion and reliance[7] upon the document is improper.

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6. Petitioner initially claimed the communication fell within the "crime/fraud exception" (JA 50- JA 53). This argument was specious at best and was properly rejected by the District Court. *Id.*; *see also Murphy v. Housing Auth. and Urban Redevelopment Agency of the City of Atlantic City*, CA. No. 97CV1558 slip. op. (D.N.J. Feb. 28, 2002).

7. Petitioner has not only filed the correspondence with this Court, but also with the Third Circuit Court of Appeals and the United States District Court for the District of New Jersey. Petitioner has also disclosed the contents of the attorney-client communication to members of the press. *See* Respondents' Motion for Sanctions filed Sept. 19, 2001, *Murphy v. Housing Auth.*, No. 97CV1558 (D.N.J); Tim O'Brien, *For "Rambo" Tactics in Tossed Case, Judge Assesses Attorney $59,216*, NEW JERSEY LAW JOURNAL, Sept. 3, 2001 at p. 13; and Charles Toutant, *Bad-Faith Appeal Costs Lawyer $58,000*, NEW JERSEY LAW JOURNAL, Oct. 28, 2002 at p. 5.

On February 28, 2002, the District Court issued an opinion denying Respondents' request for further sanctions against Petitioner based on the limited record before it. However, the District Court went on to state:

> I do not mean to intimate approval of Mr. Van Syoc's behavior. The only precaution Mr. Van Syoc took before filing an **obviously privileged communication** with this Court, the Court of Appeals, and freely discussing its contents with the press, was to consult with 'ethics counsel' and conclude that the crime/fraud exception lifted the cloak of confidentiality. . . . Such a conclusion is not supported by the case law . . . nor by the contents of the letter in question. The far wiser, more professional, and ethical course of action would have been to 'refrain from examining the materials, notify the sending lawyer, and abide by the instructions of the lawyer who sent them.' . . . Although I cannot impose sanctions on Mr. Van Syoc in this instance, **I strongly urge him to remedy his ethical lapse by returning the letter to Defendants' counsel and to refrain from referring to or using the letter or its contents in the future.** (emphasis added).

Id. at p. 11-12 (internal citations omitted). Despite this directive, Petitioner has not "remed[ied] his ethical lapse," but compounded it by filing the privileged communication with this Court as an appendix to the Petition.

Furthermore, Petitioner's arguments regarding the correspondence are factually inaccurate. At no time did Respondents' counsel stray from his position that Plaintiffs' claims were without merit and would ultimately be defeated. *See* JA 92 *et seq.*, JA 444, *et seq.*, JA 718, 748. At each settlement conference and in each correspondence with Petitioner,

Respondents' counsel made this position clear. *Id.* In addition, the letter, which was written *after* all of Plaintiffs' claims were dismissed by the District Court and while the dismissal was pending before the Third Circuit, does not say the case has a 50/50 chance to go to the jury. *See* App. D to Pet. The correspondence sets forth various possibilities given the Third Circuit's decision in *Iadimarco v. Runyon*, 190 F.3d 151 (3d Cir. 1999) and sets forth estimates of the likelihood of each scenario.[8]

II. There Is No Dispute Between The Third Circuit and Other Courts of Appeal.

Petitioner appears to claim the lower court's opinions are inconsistent with decisions of another United States Court of Appeal. *See Pet.* at pp. 5-7. However, Petitioner does not identify which circuits he claims have issued opinions inconsistent with the Third Circuit's opinion in this case or how those decisions are inconsistent. *Id.* On page 11 of the Petition, Petitioner claims that *Williams v. Giant Eagle Markets*, 883 F.2d 1184 (3d Cir. 1989) and *Hackman v. Valley Fair*, 932 F.2d 239 (3d Cir. 1991) were applied in an Eleventh Circuit case, *McMahan v. Toto*, 256 F.3d 1120 (11th Cir. 2001), *cert. denied*, __ S. Ct. __, 2003 WL 159312, and by district courts in Louisiana, Nebraska and California. However, none of the decisions cited by Petitioner even mention *Williams* or *Hackman*.

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8. Petitioner claims, without citation, that Respondents' counsel "misrepresented his own appraisal of the merits just to obtain an award of sanctions." *Pet.* at p. 9. There is no support in the record for this proposition. Respondents' counsel has consistently argued that plaintiffs' claims were without legal or factual basis. *See, e.g.*, Respondents' Motion for Summary Judgment (JA 92 *et seq.*); Respondents' Application for Counsel Fees (JA 444 *et seq.*) and related documents.

Furthermore, the lower courts' decisions in this case are not inconsistent with Eleventh Circuit precedent. For example, in *Bryne v. Nezhat*, 261 F.3d 1075 (11th Cir. 2001), the Eleventh Circuit upheld an award of sanctions against an attorney who "filed a frivolous lawsuit, in bad faith, for the purpose of extorting a settlement from the defendants." *Id.* at 1117. *Bryne* was a "garden variety medical malpractice claim." *Id.* at 1115. However, plaintiff brought a multi-count complaint alleging, *inter alia*, fraud, mail fraud, battery and violations of the Georgia RICO statute. *Id.* All of the claims (except the medical malpractice claims) were without factual and/or legal basis. *Id.* at 1115. The Eleventh Circuit held that "by expanding her case to include the RICO charge and the other baseless claims [the attorney] subjected himself to sanctions." *Id.* Another example is *Avirgan v. Hull*, 932 F.2d 1572 (11th Cir. 1991), *cert. denied*, 502 U.S. 1048 (1992), where the Eleventh Circuit upheld awarding fees against attorneys who "willfully abuse[d] judicial process by conduct tantamount to bad faith." *Id.* at 1582. In so doing, the Eleventh Circuit held that it was "well established that: . . . '[w]hen it becomes apparent that discoverable evidence will not bear out the claim, the litigant and his attorney have a duty to discontinue their quest.'" *Id.* (*quoting Collins v. Walden*, 834 F.2d 961, 965 (11th Cir. 1987)). When counsel continued to litigate claims that discovery revealed were without basis, he was ordered to pay fees and costs pursuant to § 1927. *Id.*

McMahan v. Toto, 256 F.3d 1120 (11th Cir. 2001), does not change this analysis. In *McMahan*, plaintiffs' counsel relied on language in a previous case, which the district court found was "not entirely clear, and actually [did] offer some support for [plaintiffs'] interpretation of that opinion, although not enough to convince us their interpretation is correct." *Id.* at 1129. Thus, the Eleventh Circuit held that it was not an abuse of discretion for the district court to refuse to award sanctions under § 1927.

Id. McMahan is distinguishable because the district court in that case twice denied summary judgment before concluding that plaintiff's reading of the earlier precedent was wrong. *Id.* That is clearly distinguishable from this case wherein the district court granted Respondents' motion for summary judgment finding that Plaintiffs had failed to come forward with a scintilla of evidence to support their claims.

The remaining cases cited by Petitioner, *Adams v. Autozoners, Inc.* No. 99-2336, 2000 WL 235240 (E.D. La. Feb. 29, 2000), *Hall v. Hormel Foods, Corp.*, No. 8:98cv304, 2000 WL 1062103 (D. Neb. July 20, 2000) and *Glad-A-Way, Inc. v. Lynn Mayer's Great Lakes Glads, Inc.*, No. 5-93-239, 1994 WL 69467 (N.D. Cal. Feb. 23, 1994) are not decisions by United States courts of appeal. Contrary to Petitioner's claim, this Court need not grant a writ of certiorari where there may be a dispute among district courts. *See Pet.* at p. 7. Accordingly, Rule 10(a) is not implicated by those decisions. Furthermore, *Adams*, *Hall* and *Glad-A-Way, Inc.* are not inconsistent with the lower courts' decisions in this case.

III. The Lower Courts' Opinions Were Consistent With Previous Precedent And Do Not Warrant This Court's Attention.

The lower courts' decisions are also consistent with prior Third Circuit precedent. The District Court correctly identified the governing standards of law[9] for determining whether fees are appropriate under 28 U.S.C. § 1927 and applied those standards

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9. Petitioner claims that "whether plaintiff had made a 'colorable claim' of employment discrimination" is "another applicable standard." *Pet.* at p. 14. Neither case cited by Petitioner supports an alternative basis for avoiding liability under § 1927. In both *Campana v. Muir*, 615 F. Supp. 871 (E.D. Pa. 1985), *aff'd*, 786 F.2d 188 (1986) and *Hackman v. Valley Fair*, 932 F.2d 239, 243 (3d Cir. 1991), the courts applied the same standards as were utilized in this case.

to the specific facts of this case. *See e.g.*, *Murphy Fees*, 158 F. Supp. 2d at 445-47. The District Court made a specific finding of bad faith:[10]

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10. Petitioner's claim that "the lower Courts made no express finding of [bad faith]," *Pet.* at p. 10, is simply false. Clearly, a specific finding of bad faith was made by the District Court and affirmed by the Court of Appeals. Furthermore, Petitioner's repeated claims that the Third Circuit affirmed the District Court's opinion without analysis, *Pet.* at pp. 10, 11, 12, are also false and implies that an appellate courts standard of review is plenary, which is incorrect. A court of appeals reviews the grant of attorneys' fees under 28 U.S.C. § 1927 pursuant to an abuse of discretion standard. *Baker Industries, Inc. v. Cerberus Ltd.*, 764 F.2d 204, 210 (3d Cir. 1985). As the Eleventh Circuit has noted,

> [t]he abuse of discretion standard of review recognizes that for the matter in question, there is a range of choice for the district court and so long as its decision does not amount to a clear error of judgment [the appellate court] will not reverse even if [the appellate court] would have gone the other way had the choice been ours to make.

McMahan v. Toto, 256 F.3d 1120, 1128 (11th Cir. 2001). "[I]f reasonable [people] could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion." *MCI Telecommunications Corp. v. Teleconcepts, Inc.*, 71 F.3d 1086, 1102 (3d Cir. 1995), *cert. denied*, 519 U.S. 815 (1996) (quoting *Silberman v. Bogle*, 683 F.2d 62, 65 (3d Cir. 1982)). It is only where "no reasonable [person] would adopt the district court's view" that the appellate court can find an abuse of discretion. *Id.* Further, a district court's finding of willfulness on the part of counsel is a finding of fact that is subject to reversal only if clearly erroneous. *Baker*, 764 F.2d at 210. This standard requires the appellate court "to pay deference to the district court's interpretation of the factual record before it." *Id.* Once a finding of willfulness has been made, the appropriateness of assessing attorney's fees against counsel under § 1927 is a matter for the district court's discretion. *Id.*

> Applying these standards to Mr. Van Syoc's conduct during the course of this lawsuit, I conclude that he acted in bad faith by 'multipl[ying] the proceedings in [this] case unreasonably and vexatiously.' 28 U.S.C. § 1927. I base this conclusion on the following considerations: (1) Mr. Van Syoc's pursuit of baseless claims, the frivolous nature of which he should have been aware by, at the latest, the Defendants' filing of their motion for summary judgment on August 17, 1998; and (2) Mr. Van Syoc's assertion of Roseann Murphy's *per quod* claim under the New Jersey Law Against Discrimination, N.J.S.A. § 10.5-1 *et seq.*, and Title VII, 42 U.S.C. § 2000e *et seq.*, when both federal and New Jersey state courts had already held that *per quod* claims were not cognizable under either of those sources of law.

Id. at 445-47. This finding was affirmed by the Court of Appeals. *Murphy v. Housing Auth.*, Nos. 01-3426 and 01-3572 (3d Cir. Oct. 16, 2002).

This decision was wholly consistent with *Ford v. Temple Hospital*, 790 F.2d 342 (3d Cir. 1986), where the Third Circuit held that although plaintiff's *initiation* of the complaint in violation of the statute of limitations was not in bad faith or frivolous, the continuance of the litigation after the motion for summary judgment was filed was in bad faith and subjected the attorney to sanctions pursuant to § 1927. *Id.* at 349, 350 (*emphasis in original*); *see also Loftus v. Southeastern Pennsylvania Transp. Auth.*, 8 F. Supp. 2d 458, 459 (E.D. Pa. 1998), *aff'd*, 187 F.3d 626 (3d Cir. 1999), *cert. denied*, 528 U.S. 1047 (1999) (sanctions appropriate where attorney continued litigation after it became frivolous) and *Hicks v. Arthur*, 891 F. Supp. 213, 215 (E.D. Pa. 1995), *aff'd*, 91 F.3d 123 (3d Cir. 1996) (same).

Furthermore, *In re Prudential Insurance Company*, 278 F.3d 175, 190 (3d Cir. 2002), does not set new or different standards for applying 28 U.S.C. § 1927, but applies the four requirements which are "evident from the text of the statute." *Id.* at 188 (*citing Williams v. Giant Eagle Markets*, 883 F.2d 1184, 1191 (3d Cir. 1989). *In re Prudential* supports the imposition of fees and costs pursuant to § 1927 where an attorney litigated in a "vexatious manner" "multipl[ing] the proceedings at nearly every turn, and increas[ing] the cost of this litigation." *Id.* at 190. In so doing, the Third Circuit stated: "[i]ndications of bad faith are findings that the claims advanced were meritless, that counsel knew or should have known this, and that the motive for filing the suit was for an improper purpose such as harassment." *Id.* at 188 (*quoting Smith v. Detroit Fed'n of Teachers Local 231, Am. Fed. of Teachers, AFL-CIO*, 829 F.2d 1370, 1375 (6th Cir. 1987)). Similarly, in this case, the Third Circuit affirmed the District Court finding that:

> Clifford L. Van Syoc, Esquire, has in bad faith turned a blind eye to the facts and law and has unreasonably and vexatiously multiplied the proceedings in this case. The record reveals that Mr. Van Syoc continued to pursue this lawsuit even when it became clear that there was no basis in law or fact upon which his clients could prevail. While the Rules of Professional conduct impose a duty upon attorneys to represent their clients' interests zealously, Mr. Van Syoc's zeal in this case had more to do with the recovery of his counsel fees than the merits of his clients' claims.

Murphy Fees, 158 F. Supp. 2d at 441. The District Court, which was readily familiar with the facts and circumstances involved in this litigation, having managed it on "the front lines" since 1997, found that Petitioner multiplied the proceedings by continuing

this litigation after it was clear that it had no merit in an unreasonable and vexatious manner, thus increasing the costs of the proceedings with the motive not of serving his clients, but of securing his own counsel fees. *Id.* This holding is consistent with *In re Prudential*, 278 F.3d at 187.

The lower court decisions are also consistent with *Mone v. C.I.R*, 774 F.2d 570 (2d Cir. 1985).[11] In *Mone*, the Second Circuit awarded fees against an attorney who raised arguments that were wholly without merit. *Id.* at 574-75. The lower courts found Petitioner also argued claims that had no legal or factual support. *Murphy Fees* at 158 F. Supp. 2d at 449-50. Accordingly, those decisions are consistent with *Mone*.

Furthermore, the District Court and Court of Appeals decisions are not inconsistent with *Williams v. Giant Eagle Markets*, 883 F.2d 1184 (3d Cir. 1989) or *In re Orthopedic Bone Screw Products*, 193 F.3d 781 (3d Cir. 1999), which are factually distinguishable. In *Williams*, the district court sanctioned an attorney for bringing suit because the attorney "knew or should have known that plaintiff's insubordinate conduct caused her discharge and not her race." *Id.* at 1191. The court of appeals reversed, finding the district court's reasoning "untenable since disproving insubordination is not part of a plaintiff's *prima facie* case." *Id.* In this case, the discovery process, including document discovery and depositions, established that the factual basis for Plaintiffs' claims simply did not exist. At his deposition, Mr. Murphy reviewed the payroll summaries of each of the individuals that he claimed obtained special treatment and he

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11. Petitioner claims without explanation that the Third Circuit's imposition of fees "fl[ew] in the face of its own prior decisions" including *Mone*. *Pet.* at p. 10. Petitioner's claim is unsupportable and *Mone* is not a prior decision of the Third Circuit, but was decided by the Second Circuit.

was unable to identify any discrepancies that would indicate that any of those individuals received pay raises for reasons other than legitimate business reasons such as those set forth in Murphy's own payroll records. (JA 133-34). Even after learning that the facts upon which they based the Amended Complaint did not exist, Plaintiffs and Petitioner refused to discontinue the litigation.

Furthermore, in *In re Orthopedic Bone Screw Products*, the district court refused to sanction an attorney for pleading the "fraud-in-the-market" theory, which developed in securities cases, in a multidistrict litigation involving allegedly defective bone screw implantation devices and claims that certain medical associations conspired with manufacturers, finding that there were unresolved questions of fact (which precluded dismissal of the claims pursuant to Fed. R. Civ. P. 12(b)(6)). *Id.* at 784-85, 796. That case is distinguishable because the Petitioner was not making a good faith attempt to expand existing caselaw and because there were no disputes of fact that precluded dismissal in this case.

In addition, here Petitioner continued to make outrageous settlement demands,[12] which were not present in *Williams* or *In re Orthopedic Bone Screw Products* distinguish this case. In fact, the attorneys in *In re Orthopedic Bone Screw Products* in response to the court's Rule 11 concerns, provided a 750-

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12. Although Petitioner claims the District Court improperly considered his settlement positions in making its decision, Petitioner has failed to offer any legal citation to support those claims. Federal Rule of Evidence 408 only prohibits use of settlement positions for determinations of liability and damages in the main case – not a subsequent fee petition. In fact, there is nothing improper in the District Court's consideration of evidence regarding Petitioner's motivation in making its determination of whether Petitioner acted in bad faith.

page particularized statement of facts with exhibits explaining the basis for their claims and obtained the court's approval of a form amended complaint prior to forwarding the amended complaint to various plaintiffs' attorneys for modification. *Id.* at 796. While this "was not dispositive, we believe it strongly supports the District Court's determination that plaintiffs' counsel did not act in bad faith; to the contrary, they responded to the court's request to cure potential defects in the complaints before proceeding further." *Id.* at 796.

Contrary to Petitioner's claims, the District Court did not impose fees against Petitioner simply because-he "merely defended a weak claim," (*Pet.* at p. 11) or because he opposed summary judgment, (*Pet.* at p. 4). The District Court ordered, and the Court of Appeals affirmed, the imposition of fees because Petitioner violated his professional obligations by continuing to litigate claims that had "no basis in law or fact." *Murphy Fees*, 158 F. Supp. 2d at 441. Furthermore, the District Court did provide guidance to counsel who litigate civil rights cases which provide for fee-shifting, namely not to disregard their professional obligations; not to turn a blind eye to the facts and law to pursue claims even when it has become clear that the claims have no basis and not to be motivated more by the recovery of counsel fees than the merits of their clients' interests. *See, e.g., Murphy Fees*, 158 F. Supp. 2d at 441.

IV. There Are No Compelling Reasons For Granting The Writ.

As set forth above, this case is not one of national importance that requires the Court's attention. Respondents will not restate the arguments made above, but will address a few specific arguments raised in the Petition.

A. The Lower Court Opinions Do Not Threaten to Chill Litigants or Attorneys From Bringing Legitimate Civil Rights Claims.

Nothing in the Third Circuit or the District Court's decisions should be of concern to responsible attorneys who legitimately and zealously defend their client's rights. The actions that the District Court and the Third Circuit found to be in bad faith were Petitioner's "Rambo" activities that were in total disregard of his professional obligations to the court, other members of the bar and his clients. *Murphy Fees*, 158 F. Supp. 2d at 441. The crux of the Court's decision was that "Van Syoc's zeal in this case had more to do with the recovery of his counsel fees than the merits of his clients' claims." *Id.*

Attorneys are protected because courts must make a specific finding of bad faith before fees will be assessed against them. *Baker Industries v. Cerberus Ltd.*, 764 F.2d 204, 209 (3d Cir. 1985). The purpose of this requirement is to protect attorneys from awards of fees for simple errors. *Id.* "If it were otherwise, an attorney who might be guilty of no more than a mistake in professional judgment in pursuing a client's goals might be liable for excess attorney's fees under § 1927." *Id.* This requirement was also recognized in the legislative history of the 1980 amendment to § 1927 where the conference report of the House and Senate stated "[t]he high standard which must be met to trigger 1927 insures that the provision in no way will dampen the legitimate zeal of an attorney representing his client." *See Joint Explanatory Statement of the Comm. of Conference*, 96th Cong. 2d Sess. 8, *reprinted in* 1980 U.S.C.C.A.N. 2781. Thus, attorneys who simply make mistakes or ultimately are not successful in the litigation, but meet their professional obligations and do not act in bad faith, will not be sanctioned pursuant to § 1927. However, defendants, the public

and the judicial system will be protected from attorneys, such as Petitioner, who "callously disregard their professional obligations."

The lower court decisions were also not a failure to apply *Hackman v. Valley Fair*, 932 F.2d 239 (3d. Cir. 1991), which is distinguishable from this case. *See Pet.* at p. 11. In *Hackman*, the plaintiff sued his union for breach of the duty of fair representation. *Id.* at 239. At his deposition, the plaintiff made statements that were extremely detrimental to his claim. *Id.* at 240-41. In opposing a motion for summary judgment, the plaintiff submitted an affidavit contending that he was confused at his deposition. *Id.* at 243. The Third Circuit held that the district court properly rejected the plaintiff's affidavit and granted summary judgment, but that the court had erred in assessing fees against plaintiff's attorney under § 1927. In *Hackman*, the plaintiff's attorney stated that she had explained to the plaintiff that his deposition was detrimental to his case and that after discussions with plaintiff advising him that his deposition was detrimental, the attorney determined that the case was initially brought, and was being continued, in good faith. *Id.* at 242. The attorney also stated that she believed it was her ethical obligation to continue representing her client and to present his position to the court. *Id.* The Third Circuit recognized that "conduct by an attorney in the circumstances here did not breach, but rather was consistent with the duties of professional responsibility in assisting the Court to resolve the litigation." *Id.* at 243. Because of the attorney's actions in advising her client that his deposition had been detrimental to his case, this Court found that it was clearly erroneous to assess fees against the attorney pursuant to § 1927. *Id.* Thus, in order to avoid being liable for fees, an attorney must simply do what he/she is already obligated to do under the Rules of Professional Conduct. The District Court found that Petitioner did not meet his

professional obligations, but "callously disregarded" them. *Murphy Fees*, 158 F. Supp. 2d at 441.

Petitioner claims, without any legal citation, that "where, as here, counsel must wrestle with 'pretext analysis,' no such finding of 'bad faith' can lie," must be rejected. *Pet.* at pp. 12-13. First neither the language of 28 U.S.C. § 1927, nor the legislative history of the statute, provides any exception for employment discrimination cases or for cases involving "pretext analysis." *See* 28 U.S.C. § 1927; *Joint Explanatory Statement of the Comm. of Conference*, 96th Cong. 2d Sess 8, *reprinted in* 1980 U.S.C.C.A.N. at 2781. Secondly, other statutes, including 42 U.S.C. § 1988 permit awarding attorneys' fees to prevailing defendants as well as prevailing plaintiffs. *See* 42 U.S.C. § 1988. As this Court noted in reviewing the legislative history of § 1988 statute, Congress "wanted to protect defendants from burdensome litigation having no legal or factual basis." *Christianburg Garmet Co. v. EEOC*, 434 U.S. 412, 420 (1978). Pretext analysis must be performed in virtually all employment discrimination cases and experienced counsel such as Petitioner cannot later hide behind that shield. Accordingly, Petitioner's argument is without merit.

Petitioner's argument that his behavior should be excused because of the evolving nature of employment discrimination law should also be rejected. While arguably there are certain aspects of employment discrimination law – as well as all areas of law – which are evolving, none of those areas gave Plaintiffs' meritless claims any hope of success. The requirement that plaintiffs in such cases establish that they were subject to an adverse employment action, and that the actions were not because of a legitimate business purpose but rather were for the discriminatory reasons alleged, is well-settled and at the core of the New Jersey

Law Against Discrimination and Title VII.[13] *See, e.g., St. Mary's*, 509 U.S. 502; *Lehmann v. Toys 'R Us, Inc.*, 626 A.2d 445 (N.J. 1993). Furthermore, it is equally clear that *per quod* claims are not recoverable in discrimination cases. *See Catalane v. Gilian Instrument Corp.*, 638 A.2d 1341 (N.J. App. Div. 1994).[14] Of course, it is axiomatic that loss of consortium claims are derivative claims that fail as a matter of law if the related claims fail. *Tichenor v. Santillo*, 527 A.2d 78 (N.J. App. Div. 1987).

Petitioner, a seasoned employment attorney, clearly knew or should have known these basic legal principles. From the beginning of this litigation, it was clear that Plaintiffs could not establish that the reasons provided by Respondents for their employment decisions were merely a pretext. It was clear, from

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13. Section 1983 civil rights claims are analyzed under the same burden-shifting analysis. *St. Mary's Honor Center*, 509 U.S. 502 (1993).

14. The district noted:

> [a]ny potential assertion by Mr. Van Syoc that he was unaware of the state of the law at the time he filed Plaintiffs' claims is belied by the fact that he himself was counsel for the plaintiffs in *Hurley v. Atlantic City Police Dep't*, 1995 WL 854478 (D.N.J. 1996), a case in which my colleague, Judge Irenas, flatly rejected an identical claim. *See Hurley*, 1995 WL 854478 at *15 (citing *Verde v. City of Philadelphia*, 862 F. Supp. 1329, 1337 n.5 (E.D. Pa. 1994) (Title VII); *Catalane v. Gilian Instrument Corp.*, 271 N.J. Super. 476, 499-500, 638 A.2d 1341, (App. Div.), *cert. denied*, 136 N.J. 298, 642 A.2d 1006 (1994) (NJLAD)). Judge Irenas's holding in *Hurley* was subsequently affirmed by the Third Circuit, *see* 174 F.3d 95 (3d Cir. 1999), and *cert. denied*, 529 U.S. 1074,120 S. Ct. 786, 145 L. Ed. 2d 663 (2000).

very early on in this case, that Plaintiffs' case was without any factual or legal merit. Despite this clarity, Petitioner continued with this litigation unreasonably, vexatiously and in bad faith.

Finally, there is no support for Petitioner's argument that the lower courts' decisions "undermine the purpose of summary judgment." *See Pet.* at p. 15. There is nothing in Fed. R. Civ. P. 56, the Comments to the Rule, or precedent discussing the rule that says – or implies – that an attorney may continue an action that he knows to be without factual and legal basis.

B. Petitioner's Due Process Rights Were Not Violated

Petitioner claims, without support, that his due process rights were violated. *See Pet.* at p. 18. Prior to the imposition of fees pursuant to 28 U.S.C. § 1927, the court must give the attorney notice that fees are being considered and an opportunity to be heard. *Eash v. Riggins Trucking Inc.*, 757 F.2d 557, 570 (3d Cir. 1985); *Jones v. Pittsburgh Nat. Corp.*, 899 F.2d 1350, 1357 (3d Cir. 1990).[15] There was no violation of due process here. Petitioner was given notice that the District Court was considering ordering fees against him personally pursuant to 28 U.S.C. § 1927 and was given an opportunity – after oral argument – to submit a supplemental brief on that specific issue. Petitioner submitted a letter brief addressing that issue on March 2, 2001. (JA 54) Further, he was clearly given notice and an opportunity to be heard. (JA 41; JA 768).

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15. Petitioner claims, without explanation, that the Third Circuit's imposition of fees "fl[ew] in the face" of the precedent set in *Jones* (*Pet.* at p. 10). However, it is clear that Petitioner was specifically aware that the court was considering awarding fees against him pursuant to 28 U.S.C. § 1927.

Furthermore, Petitioner's requests for discovery[16] on tangential issues was properly denied. Petitioner's request for discovery in his opposition brief was "in light of issues of fact as to whether the services claimed to have been rendered were in fact rendered." (JA 606). The reason for this request was the inadvertent inclusion of the name of Sharon Miller, an employee of the Housing Authority, as one of the witnesses interviewed by counsel on the time records submitted in support of Respondents' application. (JA 606). However, counsel for the Respondents provided an affidavit that stated that he had inadvertently included Ms. Miller's name on the time records, and although he had intended to meet with her on the date in question, she was unavailable. (JA 724). Counsel also stated, under oath, that the amount of time on the records provided was correct and that the services had in fact been provided. (JA 724). In its written opinion, the District Court stated:

> I find this explanation entirely reasonable. Indeed, the fact that Van Syoc would have this Court and Defendants engage in further discovery on this particular claim which is based on a typographical error of no consequence, when there is no evidence in the record whatsoever to support an inference that counsel for Defendants falsified their billing records, and the error did not actually affect the amount billed,

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16. Petitioner claims he sought discovery "over the identities of some of the lawyers appearing on the defendant Housing Authority's fee application." *Pet.* at p. 17. This claim is not supported by the record and no such discovery was requested. The only discovery requests by Petitioner were those discussed by the district court and discussed briefly herein. Moreover, the District Court reduced Respondents' fee petition, in part, because certifications about the hourly rates of some attorneys on the bills were not included thereby addressing Petitioner's only potentially viable challenge.

> *is but further evidence of Van Syoc's vexatious approach to this litigation.* [Emphasis added]

Murphy Fees, 158 F. Supp. 2d at 453 n.4.

The only other request for discovery, made at the oral argument, was unrelated to the time records, but was Petitioner's attempt to obtain Respondents' counsel's evaluations provided to its insurance carrier.[17] This request related to the attorney-client communication attached as Appendix D to the Petition and discussed in Section I above. In any event, the transcript makes clear that the privileged communication played no part in the District Court's decision, and thus is irrelevant. (JA 53).

Petitioner's statement at oral argument that this request goes to "what was going on inside my head, what was going on inside Mr. Ercole's head" further supports the absurdity of his request. (JA 53). How could an attorney-client correspondence between defense counsel and their carrier provide any insight as to "what was going on inside [Petitioner's] head"? As the Court properly found, "what was going on inside Mr. Ercole's head" is completely irrelevant. The fact is that Petitioner's continuance of this action, after it was clear that the claims had no merit either factually or legally, was unreasonable and vexatious and the District Court properly awarded sanctions and the Third Circuit properly affirmed that order.

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17. At oral argument, Van Syoc stated:

> We have asked for discovery, if the Court's inclined to give them sanctions. I know they claim that there are other letters that apparently take the opposite position where apparently they did claim to the carrier that the matter was frivolous. I don't have a problem with the Court seeing those, although I think we're entitled to see them if it is going to be a basis for an imposition of fees.

(JA 52).

Riding v. Towne Mills Craft Centre, Inc., 764 A.2d 1004 (N.J. 2001), cited at page 18 of the Petition does not compel discovery or raise any question about the propriety of the lower courts' decisions. *Riding* involved a plaintiff who had failed to request attorney's fees and costs as part of a voluntary arbitration of an age discrimination case. *Id.* The intermediate appellate court held that plaintiff could still recover the fees and costs and the defendant could request a trial de novo. One issue raised in dissent was that the defendant could not decide whether or not to request a trial de novo because the attorney fee issue was left open. *Id.* at 1006. The New Jersey Supreme Court addressed that argument by saying "attorneys generally are able to estimate an adversary's fee request. If necessary, the parties to the arbitration would not be precluded from seeking abbreviated discovery to facilitate the estimate. . . ." *Id.* at 1011. *Riding* is irrelevant to this matter because Petitioner never challenged the amount of the fees requested by Respondents before the District Court. *Murphy Fees*, 158 F. Supp. 2d at 453. Furthermore, the discovery Petitioner sought did not relate to the amount of fees claimed, but only tangential issues.

C. The Amount of Fees Ordered was Appropriate[18]

Even if Petitioner had preserved his challenges as to the amount of the fees and costs awarded, which he has not, those

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18. Petitioner waived any challenge to the amount of fees sought by the Respondents when he failed to contest them at the District Court level. *See Murphy Fees*, 158 F. Supp. 2d at 453; *Paramount Aviation Corp. v. Augusta*, 178 F.3d 132, 149 (3d Cir. 1999), *cert. denied*, 528 U.S. 878 (1999) (where the appellant never attempted to rebut the calculation of amounts due before the District Court, he could not do so on appeal); *Barnes v. American Tobacco Co.*, 161 F.3d 127, 155 n.36 (3d Cir. 1998), *cert. denied*, 526 U.S.

(Cont'd)

challenges should be rejected. The District Court properly awarded fees and costs from the date the motion for summary judgment was filed (August 17, 1998) through the date the District Court granted the motion and dismissed all of Plaintiffs' claims (January 27, 1999). The District Court properly applied the standards set forth in *Browning v. Kramer*, 931 F.2d 340 (5th Cir. 1991). Contrary to Petitioner's claims, Respondents were forced to do far more than merely file a reply brief. Until the motion for summary judgment was granted, this case was active and Respondents (and Plaintiffs) continued preparing the case for trial. Respondents were simply complying with the District Court's scheduling order and the local rules of civil procedure.[19] Respondents' counsel was duty-bound to represent his clients and to comply with the District Court's scheduling order and the local rules of civil procedure regardless of whether he felt Plaintiffs' claims had merit.

(Cont'd)

1114 (1999) (appellant waived claim that report contained typographical error, where the issue was not raised below); *Abraham v. Raso*, 183 F.3d 279, 299 (3d Cir. 1999) (issue that was not raised before the District Court is waived); *see also Holmes v. Pension Plan of Bethlehem Steel Corp.*, 213 F.3d 124, 139 (3d Cir. 2000) (where issue was not raised below, it has been waived). Despite this waiver, Petitioner challenges the size of the Third Circuit's award, so Respondents will briefly address those claims.

19. Petitioner's claims that Respondents spent too much time preparing for trial are without merit. The amount of time expended by Respondents in preparing for trial was increased because of Petitioner's unreasonable and vexatious behavior, including numerous requests for continuance of the trial date requiring repetitive trial preparation and identifying 50 trial witnesses, 321 exhibits to be offered at trial and 14 separate legal issues in his pre-trial order. (Add. at 059-075). Conversely, the Respondents identified a total of six witnesses (three of which were named parties) (Add. at 053-055) and ten exhibits. (Add. at 081).

CONCLUSION

Respondents respectfully submit that the Petition for a Writ of Certiorari presents no genuine issues worthy of United States Supreme Court review, and urge the Court to deny certiorari.

Respectfully submitted,

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